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SHDKT PROCEEDINGS AND ORDERS DATE: [07/09/93]

CASE NBR: [92107944] CFX STATUS: [DECIDED]
SHORT TITLE: [Poyner, Syvasky L.]
VERSUS [Murray, Edward W., et al.] DATE DOCKETED: [031293]
*** CAPITAL CASE *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Mar 12 1993	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Mar 15 1993	D	Application (A92-698) for stay of execution, submitted to The Chief Justice.
4	Mar 17 1993	X	Brief of respondent Edward W. Murray in opposition filed.
5	Mar 17 1993	X	Brief of petitioner Poyner Reply to Respondent's Brief in Opposition and oppositionto motion for stay of execution filed.
6	Mar 17 1993		Response to application (A92-698) filed by Respondent.
7	Mar 17 1993		(A92-698) Reply to Respondent's opposition to motion for stay of execution filed by Petitioner
8	Mar 17 1993		Application (A92-698) referred to the Court by the Chief Justice.
9	Mar 18 1993		Application (A92-698) denied by the Court.
10	Mar 25 1993		DISTRIBUTED. April 16, 1993

PREVIOUS 1 1 EXIT

Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [07/09/93]

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	DATE	NOTE	PROCEEDINGS & ORDERS
12	Apr 19 1993		REDISTRIBUTED. April 23, 1993
14	May 10 1993		REDISTRIBUTED. May 14, 1993
16	May 17 1993		Petition DENIED. Opinion by Justice Souter respecting the denial of certiorari with whom Justice Blackmun and Justice Stevens join. (Detached opinion.)

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1PP

92-7944

Supreme Court, U.S.
FILED
MAR 12 1993
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

SYVASKY LAFAYETTE POYNER,
Petitioner,

v.

EDWARD W. MURRAY,
ELLIS B. WRIGHT, JR.,
and JOHN DOE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Fourth Circuit Exceed Its Jurisdiction By Issuing a Mandate Ordering the United States District Court for the Eastern District of Virginia to Dismiss Poyner's § 1983 Lawsuit on an Appeal of a Discovery Order Entered in the Ordinary Progress of Poyner's Lawsuit While Defendants' Motion to Dismiss Was Still Pending in the District Court Prior to Briefing and Oral Argument?

2. Did the Court of Appeals for the Fourth Circuit Err By Failing to Consider the Claims in Poyner's Complaint Challenging Virginia's Electric Chair and Virginia's Execution Procedures When It Issued a Mandate Ordering the United

States District Court for the Eastern District of Virginia to Dismiss Poyner's § 1983 Lawsuit?

3. Did the Court of Appeals for the Fourth Circuit Err In Basing Its Decision to Issue a Mandate Ordering the United States District Court for the Eastern District of Virginia to Dismiss Poyner's § 1983 Lawsuit on the 100-year-old precedent of In re Kemmler, 136 U.S. 436 (1890)?

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IV.

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the Court of Appeals for the Fourth Circuit dated January 19, 1993, issuing a mandate to the United States District Court for the Eastern District of Virginia to dismiss the class action § 1983 lawsuit filed by Petitioner on behalf of himself and others similarly situated.

V.

OPINIONS BELOW

Poyner was originally convicted of five counts of capital murder in 1984 in the respective circuit courts of Williamsburg, Hampton, and Newport News. Poyner was sentenced to death for each count. As of that time, Virginia's statutes required that death sentences be carried out by electrocution at the State Penitentiary in Richmond. Va. Code § 53.1-233 (Repl. Vol. 1988), amended, Va. Code § 53.1-233 (Repl. Vol. 1991)(the amendment rescinded the requirement that executions be performed in Richmond). Poyner appealed the convictions and death sentences to the Supreme Court of Virginia, which affirmed each conviction and death sentence. Poyner v.

Commonwealth, 229 Va. 401, 329 S.E.2d 815, cert. denied sub nom. Poyner v. Virginia, 474 U.S. 865 (1985). Although Poyner generally challenged the constitutionality of Virginia's capital murder statute on direct appeal to the Supreme Court of Virginia, see Poyner v. Commonwealth, 229 Va. at 406, 329 S.E.2d at 820, he did not challenge the method of execution as it existed at that time. A petition for a Writ of Certiorari was denied by this Court on October 7, 1985. See Poyner v. Commonwealth, 474 U.S. 865, 888 (1985).

Poyner attempted unsuccessfully to collaterally attack the convictions through petitions for habeas corpus relief in state and federal courts. Poyner filed petitions for writs of

habeas corpus in each of the convicting courts. Each court denied the respective petition after hearing argument but without evidentiary hearings, and the Supreme Court of Virginia refused Poyner's petitions for appeal. This Court subsequently denied Poyner's Petition for writ of certiorari. Poyner v. Bair, 488 U.S. 871 (1988).

Poyner then sought relief in the federal courts, filing three separate petitions for writs of habeas corpus in the United States District Court for the Eastern District of Virginia on January 12, 1989. A United States Magistrate recommended that all three of Poyner's petitions be denied and dismissed. By three orders, dated December 21, 1990, the district court adopted and approved

the findings and recommendations of the magistrate's reports, denied Poyner's objections thereto, and dismissed his petitions. Poyner's appeals to the Court of Appeals for the Fourth Circuit were denied on May 8, 1992. This Court denied Poyner's Petition for Writ of Certiorari on November 2, 1992.

Poyner recently attempted to raise the issue of the constitutionality of Virginia's method of execution by electrocution in federal court in a class action under 42 U.S.C. § 1983, but was denied the opportunity to present his evidence there. Poyner v. Murray, No. 92-CV-815 (E.D. Va. filed Dec. 10, 1992).[1] The Fourth Circuit thwarted Poyner's attempt to present evidence on

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[1]Appendix, pp. 1 - 55 (hereinafter A ___.)

this issue when, on appeal of a simple discovery order and without briefs or arguments, it ordered the case to be dismissed. Poyner v. Murray, No. 93-6052 (4th Cir. January 19, 1993).[2] The Fourth Circuit's order did not even address Poyner's claim concerning Virginia's particular method of electrocution; rather, the court relied on numerous cases standing for the proposition that electrocution is not per se unconstitutional. The Fourth Circuit's Order also did not consider directly the issue that was raised in the notice of appeal, but took the extraordinary step of directing the District Court to dismiss Poyner's lawsuit forthwith with prejudice. The

[2]A69-A77.

Fourth Circuit's Mandate issued that same evening.[3] Poyner's subsequent petition for rehearing, petition for rehearing en banc and petitions for a recall of the mandate were denied. Poyner v. Murray, No. 93-6052 (4th Cir. February 17, 1993).[4]

This petition for certiorari to this Court seeks review of the Fourth Circuit's Order issuing a Mandate to the District Court to dismiss Poyner's § 1983 class action lawsuit.

[3]A78.

[4]A79-A81.

VI.

JURISDICTION

Petitioner seeks review of the Court of Appeals for the Fourth Circuit's Order entered on January 19, 1993, issuing a Mandate to the District Court to dismiss Petitioner's § 1983 class action lawsuit.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

VII.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 1292 provides, in relevant part:

> [T]he courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, . . . or the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . .

VIII.

STATEMENT OF THE CASE

On December 10, 1992, Syvasky L. Poyner, on behalf of himself and all others similarly situated, by counsel, filed an action based on 42 U.S.C. § 1983 seeking a declaration that the administration of death sentences by electrocution as practiced by the Commonwealth of Virginia constitutes cruel and unusual punishment, such that the Commonwealth must be enjoined from performing executions in this manner. (A1-A55). Poyner contended that an evidentiary hearing on the nature of electrocution, which was to include testimony of preeminent experts in the relevant fields of science and medicine, was necessary to determine whether the

long-established but rarely-challenged principle that electrocution is not cruel and unusual still holds true upon an examination with the benefit of modern medical knowledge.

After filing his Complaint on December 10, 1992, Poyner attempted to obtain discovery in the ordinary course of the litigation by filing discovery requests, including the ones that resulted in the District Court's Order at issue here. (A56-A66). He sought to observe and videotape the testing of the electric chair, to videotape the execution of Charles Sylvester Stamper, scheduled for January 19, 1993, and to have a neuropathologist observe Stamper's autopsy and perform a routine examination of his brain tissue. The District Court

heard oral argument on Poyner's discovery motions on January 15, 1993, at which time the defendants' Motion to Dismiss and Motion for Protective Order, among other motions, were pending. Poyner's time to file his opposition briefs to these motions had not yet run, oral argument had not yet been held and, consequently, the District Court had not yet ruled on defendants' motions.

On the afternoon of January 19, 1993, the District Court issued its Order related to Poyner's discovery motions, granting certain requests relating to the testing of the electric chair and the autopsy. (A56-A66). Later that same day, the defendants filed a notice of appeal challenging only the District

Court's ruling regarding Stamper's autopsy. (A67-A68).

Notwithstanding the agreement of both the defendants and the Court of Appeals for the Fourth Circuit that the case presented an issue of immense public importance, on January 19, 1993, the Fourth Circuit panel abruptly directed the District Court to dismiss Poyner's Complaint. (A69-A77).

The matter came before the Fourth Circuit panel on defendants' notice of appeal from the District Court's order permitting discovery. (A67-A68). As a result of the Fourth Circuit Court's action, this "case of considerable public interest" and the factual issues raised by it remain unresolved -- thus prolonging, for the antiquated technology

of the electric chair, one hundred years of unwarranted immunity from public scrutiny.

The precedents on which the Court of Appeals based its ruling descend from a decision that bears no relevance to modern jurisprudence, medicine or technology. That case, In re Kemmler, 136 U.S. 436 (1890) reviewed a New York county court decision that did not concern the Eighth Amendment, imposed on the defendant a burden of proof inconsistent with Eighth Amendment jurisprudence, gave undue deference to the factual findings of the New York state legislature, and considered, to the extent it considered it at all, medical and scientific knowledge now obsolete. Accordingly, Kemmler and its progeny have

become factually and legally irrelevant to the question whether electrocution is cruel and unusual. One hundred years of reliance on a foundation so infirm should not now shield the executioner's methods from view.

The Fourth Circuit's decision also misapprehends the actual allegations of Poyner's Complaint, (A1-A55), which do not merely challenge electrocution per se, but also attack Virginia's particular chair and Virginia's particular procedures for the use of that chair. The Fourth Circuit's decision rests entirely on cases concerning non-particularized attacks on electrocution and overlooks that portion of Poyner's Complaint that attacks Virginia's particular chair and Virginia's

particular procedures. Such allegations as these have received a hearing in federal courts. That the Fourth Circuit overlooked these aspects of the case is understandable, since Poyner never had the opportunity to file briefs on these issues either in the Fourth Circuit or in the District Court, and even the defendants never filed briefs in the Fourth Circuit.

Even if all this were not true, this Court should grant petitioner a writ of certiorari and reverse the Fourth Circuit's ruling to correct the Fourth Circuit's erroneous assumption of jurisdiction. The Fourth Circuit's decision assumed appellate jurisdiction under 28 U.S.C. § 1292(a)(1) of what the panel construed as a granted injunction,

although the District Court's discovery order under Federal Rule of Civil Procedure 34(a)(2) did not accord or protect any of the relief requested in the Complaint. Courts have consistently ruled that orders that do not accord or protect the substantive relief requested in the Complaint are not injunctions appealable pursuant to § 1292(a)(1). Thus the Fourth Circuit panel's decision overlooks material factual and legal matters and is in conflict with decisions of the Fourth Circuit and other courts of appeals. The District Court's order, which in no way pertains to the relief requested in Poyner's Complaint, quite simply was not an injunction for the purposes of § 1292(a)(1). Consequently,

the Fourth Circuit lacked jurisdiction to direct dismissal of the Complaint.

Courts are charged with the duty to ensure that no prisoner be subjected to cruel and unusual punishment, no matter how unpopular his crime. The courts cannot discharge this duty without taking evidence.

The Circuit Court for Loudoun County agreed that a Virginia court must hear evidence on this very issue.[5] The Circuit Court for Loudoun County recognized that no court has reviewed the medical and scientific evidence concerning electrocution in over 100 years, and that no court has ever taken

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[5]Poyner's counsel had appeared as special counsel for the defendant White for the sole purpose of presenting the constitutional challenge to Virginia's particular form of electrocution.

evidence on Virginia's method of electrocution. In setting aside five days to receive evidence, that court stated:

> And certainly science and technology has advanced an awful lot since 1890. And I feel somewhere a court has got to hear the evidence of what the state of the art is now on the effect of electricity on the human body during the course of execution by electrocution in Virginia.

Transcript, Commonwealth v. White, Circuit Court for Loudoun County, Crim. No. 8129 (February 11, 1993), at 5. (A82-A91). The evidentiary hearing, however, never took place because the Commonwealth dropped the capital murder charge the next day and rendered the issue moot.

Poyner simply wants an opportunity to be heard on this issue. The Fourth

Circuit's premature dismissal of Poyner's action has denied him this opportunity. Poyner asks this Court to issue a writ of certiorari to review the Fourth Circuit's Order and thereafter to reverse the Order to allow Poyner to present his evidence before the District Court. As both the Fourth Circuit and defendants noted, this case arouses considerable public interest and concerns a matter of grave public importance. In light of the matters set forth above, this is a matter of exceptional importance deserving the grant of certiorari review.

IX.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Did Not Have Jurisdiction To Issue Its Order Because The District Court's Order Was A Non-Appealable Interlocutory Discovery Order.

The Court of Appeals for the Fourth Circuit did not have jurisdiction to consider the appeal of the discovery Order relating to the autopsy of Charles Sylvester Stamper or to direct the District Court to dismiss Poyner's Complaint. While the Court of Appeals did not cite the statute upon which it relied for jurisdiction,[6] it is apparent

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[6]It is clear that the District Court's Order permitting discovery of Stamper's autopsy was an interlocutory order, not a final judgment subject to appeal pursuant to 28 U.S.C. § 1291. Nor did the District Court's Order contain a statement that an immediate appeal pursuant to 28 U.S.C. § 1292(b) was
(continued...)

from the language of the Order that it was relying upon 28 U.S.C. § 1292(a)(1):

> [T]he order of the district court is not any routine discovery order but is, in fact, an injunction and we treat it as such. There is no doubt that a refusal to comply with the district court's order of January 19, 1993 would be punishable by contempt.

Order (January 19, 1993), at 2 (A69-A77).

However, even the most routine discovery orders may be punishable by contempt. See, e.g., In re Howe, 800 F.2d 1251 (4th Cir. 1986)(punishing lawyer for contempt for failure to answer interrogatories and requests for

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[6](...continued) appropriate. Moreover, the defendants did not seek a writ of prohibition or mandamus pursuant to 28 U.S.C. § 1651, and in any event, discovery orders issued in the normal course of litigation are self-evidently not a usurpation of judicial power.

production). For the purposes of obtaining jurisdiction under 28 U.S.C. § 1292(a)(1), an "injunction" must be designed to accord or protect some or all of the substantive relief sought by a complaint in more than temporary fashion. North Carolina Ass'n of Black Lawyers v. North Carolina Bd. of Law Examiners, 538 F.2d 547, 548-49 (4th Cir. 1976); Gon v. First State Ins. Co., 871 F.2d 863, 864-65 (9th Cir. 1989), citing 16 Wright, Miller, Cooper and Gressman, Federal Practice and Procedure: Jurisdiction § 3922 at 29 (1966).

The Gon court noted that, in assessing appealability, injunctions must be distinguished from orders regulating the conduct of litigation. Gon, 871 F.2d at 865. Discovery orders are among those

orders "regulating the conduct of litigation" that are not considered injunctions for the purposes of § 1292(a)(1) jurisdiction, even though they are punishable by contempt. North Carolina Ass'n, 538 F.2d at 548-49; Gon, 871 F.2d at 865; 16 Wright, Miller, § 3922 at 30. Similarly, the court in International Prods. Corp. v. Koons, 325 F.2d 403, 406 (2d Cir. 1963) noted:

> We think it better . . . to continue to read § 1292(a)(1) as relating to injunctions which give or aid in giving some or all of the substantive relief sought by a complaint . . . and not as including restraints or directions in orders concerning the conduct of the parties . . . unrelated to the substantive issues in the action, while awaiting trial.

Otherwise, every discovery order would be immediately appealable because it is

punishable by contempt. Such a dramatic change in normal procedure would defeat the principle of avoiding piecemeal appeals. See Switzerland Cheese Ass'n v. E. Horne's Market, Inc., 385 U.S. 23 (1966).

The District Court's discovery Order granted no part of the substantive relief sought by plaintiff's Complaint, which sought a declaration that Virginia's mode of execution by electrocution is cruel and unusual punishment and an injunction against further use of that method by the Commonwealth. Rather, the Order would have permitted Poyner to have an electrical engineer inspect and videotape the electric chair on a day when no execution was planned and to have a neuropathologist observe a routine

autopsy and conduct an examination on a sample of brain tissue that was to be made available by the routine removal and sectioning of the brain by the state pathologist.

The District Court's Order merely provided Poyner with discovery reasonably calculated to assist in proving his case so that he might eventually obtain the substantive relief he seeks. As such, it was not an injunction for the purposes of 28 U.S.C. § 1292(a)(1). The Court of Appeals had no jurisdiction to entertain the defendants' appeal of a portion of the interlocutory discovery Order entered by the District Court. This Court, therefore, should reverse the January 19, 1993 Order entered by the Fourth Circuit

and recall the Mandate that that Court issued on January 19, 1993.

B. The Court Of Appeals Ruled Incorrectly On The Merits Of Poyner's Claim Because It Misconstrued The Nature Of The Action.

In addition to acting without jurisdiction, the Court of Appeals for the Fourth Circuit acted without the benefit of a full record for its consideration.[7] The Fourth Circuit

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[7]In both cases cited by the Fourth Circuit to support its extraordinary action in dismissing plaintiff's lawsuit, and unlike this case, the courts had a complete record on which to base their decisions. In Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940), this Court held that a court of appeals could dismiss and terminate litigation if "insuperable objection to maintaining the bill clearly appears." However, in Deckert, defendants' motions to dismiss had been briefed fully, argued, and ruled upon by the district court. Further, the (continued...)

panel's summary (and unexpected) Order that Poyner's entire case be dismissed was entered without briefing or oral argument, either in the Court of Appeals or in the District Court. Had there been a fully-developed record for the Fourth Circuit panel to consider when it ruled on the merits of Poyner's action, it

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[7](...continued)
defendants specifically appealed the district court's disposition of their motions to dismiss. Thus, the court in Deckert had before it a full record regarding the motions to dismiss.

Similarly, in State ex rel. Tindal v. Block, 717 F.2d 874 (4th Cir. 1983), cert. denied, 456 U.S. 1080 (1984), the Fourth Circuit recognized the necessity of a full record before a court of appeals dismisses a plaintiff's claims. In Block, the Fourth Circuit noted that it would not normally consider and dispose of an issue raised but not considered by the district court, but made an exception in Block because the record was "fully developed." Id. at 880.

would have realized that Poyner was seeking an evidentiary hearing both to show how Virginia's particular methods and procedures for electrocution inflict cruel and unusual punishment on condemned inmates and to disprove the 100-year-old factual premise of In re Kemmler, 136 U.S. 436 (1890), upon which the body of precedent cited by the panel has unquestioningly been built.

1. Poyner's Complaint Challenges Virginia's Electric Chair And Virginia's Execution Procedures As Well As Electrocution Generally

By abruptly dismissing Poyner's lawsuit without the benefit of a complete record, the Fourth Circuit misconstrued Poyner's action as solely a broad-based attack on electrocution. In its Order,

that Court stated that Poyner's "case essentially contests the validity of the Virginia statutes requiring execution by electrocution as being invalid in violation of the Eighth Amendment because electrocution is cruel and unusual punishment." Order at 2. (A69-A77).

In fact, Count II of Poyner's Complaint specifically addresses electrocution as it is carried out in Virginia. As such, Count II is not a broad attack on electrocution per se, but rather brings into question whether executions as carried out in Virginia's electric chair violate the Eighth Amendment prohibition against cruel and unusual punishment.[8]

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[8]To the extent that this Court may determine that Poyner has not raised a (continued...)

No court has reviewed evidence about Virginia's electric chair to determine whether Virginia is unnecessarily torturing prisoners. Even if electrocution is a constitutionally permissible form of capital punishment, the Fourth Circuit's reasoning is fundamentally flawed because it presumed all forms of electrocutions to be per se constitutional in every case. But, even if electrocution is a constitutionally permissible mode of capital punishment,

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[8](...continued)
claim in Count II that specifically refers to Virginia's electric chair and the manner in which electrocutions are carried out in Virginia, Poyner respectfully requests the opportunity to amend Count II to state such a claim. Under ordinary procedures, the District Court would have considered such an amendment under Fed.R.Civ.P. 15 (amendments granted liberally) during its deliberations on the motion to dismiss pending below.

not every form of electrocution is automatically constitutional.[9] Stated another way, if all forms of electrocution were presumed constitutional and if the Director of Corrections decided to execute prisoners by hooking them up to car batteries and electrocuting them over a span of hours or days, no court would be entitled to review evidence of this torture method. The irony is that Poyner has alleged a far more painful torture, but he has not been allowed his day in court to prove it.

Yet, the Fourth Circuit's order has laid down a per se rule, without taking

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[9]Likewise, though the death penalty has been consistently ruled constitutional, not every method of inflicting capital punishment is per se constitutional.

any evidence, that no federal court can review a claim pertaining to Virginia's electric chair.[10] In essence, that Court is deferring to the Department of Corrections.

Because Count II raises a claim regarding Virginia's chair, cases supporting the proposition that electrocution is not per se cruel and unusual do not apply. The holdings in Kemmler and its progeny do not prevent an action from proceeding where the claim

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[10]In several cases, courts have considered challenges and permitted evidence related to a specific electric chair, as opposed to electrocution per se. See, Thomas v. Jones, 742 F. Supp. 598 (S.D. Ala. 1990); Ritter v. Smith, 568 F. Supp. 1499, 1562 (S.D. Ala. 1983), aff'd in relevant part, rev'd in part on other grounds, 726 F.2d 1505, 1519 (11th Cir. 1984), cert. denied, 469 U.S. 869 (1984); Buenoano v. Dugger, Slip Op. No. 90-473-CIV-ORL-19, 1990 WL 119637 (M.D. Fla. 1990). (A 35(?) -).

relates to the application of electricity in a particular fashion.

2. This Court Should Also Reverse The Fourth Circuit's Summary Dismissal Because The 100-Year-Old Precedent Is No Longer Legally Or Factually Supportable.

Because of the sudden and unexpected dismissal of his case, Poyner was unable to present his arguments to disprove the 100-year-old factual premise of In re Kemmler, 136 U.S. 436 (1890), upon which nearly every case cited by the Fourth Circuit panel was based.

Execution by electrocution was examined by the New York state courts in People ex rel. Kemmler v. Durston, 119 N.Y. 569 (1890), and reviewed by this Court in Kemmler before any such executions were actually conducted in the United States. Thus, any evidence

presented to the New York court on the effects of electrocution was necessarily speculative. In its January 19, 1993 Order, the Fourth Circuit cited numerous federal and Virginia decisions for the proposition that execution by electrocution is constitutional and does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. However, every case cited in that Order can be categorized in one of two ways: (i) decisions that cite no authority for upholding the constitutionality of electrocution,[11] or

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[11] Jones v. Whitley, 938 F.2d 536, 542 (5th Cir.), cert. denied, __ U.S. __, 112 S. Ct. 8 (1991); Lindsey v. Smith, 820 F.2d 1137, 1155 (11th Cir. 1987), cert. denied, 489 U.S. 1059 (1989); Watson v. Blackburn, 756 F.2d 1055, 1058 (5th Cir. 1985), cert. denied, 476 U.S. 1153 (1986); Johnson v. Kemp, 759 F.2d 1503, (continued...)

(ii) decisions that rely on Kemmler, or on other decisions which, in turn, rely on Kemmler.[12] In no case did a court

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[11](...continued)
1510 (11th Cir. 1985), aff'd, 781 F.2d 1482 (11th Cir. 1986).

In Lindsey, the Court held the appellant's claim that death by electrocution is cruel and unusual punishment was precluded by Johnson v. Kemp, 781 F.2d 1570 (11th Cir. 1985) (per curiam). We have searched that opinion for any mention of electrocution. It is assumed the Lindsey court miscited the opinion of Johnson v. Kemp, 759 F.2d 1503 (1985), cited just above, in which the contention that death by electrocution violated the Eighth Amendment was dismissed as frivolous without authority.

[12]McCleskey v. Kemp, 481 U.S. 279, 299 (1987) (dictum); Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (Does not discuss death by electrocution, but states that punishments are cruel when they involve torture or a lingering death); State ex rel Francis v. Resweber, 329 U.S. 459, 463 n.4 (1947); Lowenfield v. Phelps, 817 F.2d 285, 298 (5th Cir. 1987), aff'd, 484 (continued...)

consider modern medical evidence of the

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[12](...continued)
U.S. 231 (1988) (incorporating the district court's opinion at 671 F. Supp. 423 (E.D. La. 1987)); Wilson v. Butler, 813 F.2d 664, 678 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988); Porter v. Wainwright, 805 F.2d 930, 943 n.15 (11th Cir. 1986), cert. denied, 482 U.S. 918 (1987); Funchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir.), cert. denied, 475 U.S. 1133 (1986); Sullivan v. Dugger, 721 F.2d 719, 720 (11th Cir. 1983); Corn v. Zant, 708 F.2d 549, 563 (11th Cir. 1983), cert. denied, 467 U.S. 1220 (1984); Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); Ralph v. Warden, 438 F.2d 786, 789 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972)(dictum); Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968); Stockton v. Commonwealth, 402 S.E.2d 196 (Va.), cert. denied, __ U.S. __, 112 S. Ct. 280 (1991); Hoke v. Commonwealth, 377 S.E.2d 595 (Va.), cert. denied, 491 U.S. 910 (1989); Townes v. Commonwealth, 362 S.E.2d 650 (Va. 1987), cert. denied, 485 U.S. 971 (1988); Beaver v. Commonwealth, 352 S.E.2d 342 (Va.), cert. denied, 483 U.S. 1033 (1987); Stockton v. Commonwealth, 314 S.E.2d 371 (Va.), cert. denied, 469 U.S. 873 (1984); Martin v. Commonwealth, 271 S.E.2d 123 (Va. 1980); Hart v. Commonwealth, 109 S.E. 582 (Va. 1921).

physiological effects of intentional electrocution.

The Supreme Court of Virginia first reviewed the constitutionality of execution by electrocution in Hart v. Commonwealth, 109 S.E. 582 (Va. 1921), which relied on the holding in Kemmler as the foundation of its decision. It is noteworthy that in Hart, the Court supported its method of reviewing Eighth Amendment challenges to Virginia statutes by citing to Aldridge's Case, 2 Va. Cas. 447, 449, 450 (1824), in which the Virginia Court had ruled that it is not cruel and unusual punishment to sentence a "free person of color" convicted of grand larceny to be sold into slavery, banished from the United States, and whipped 39 times. Hart, 109 S.E. at 587.

This Court should not adhere blindly and uncritically to these outmoded precedents. In light of modern medical and scientific evidence, Kemmler is no longer a viable foundation for the proposition that death by electrocution is not cruel and unusual punishment.

In Kemmler, the New York county court reviewed evidence presented to it and ruled that it did not overcome the presumption of the constitutionality of the legislation under the New York State Constitution (the Eighth Amendment not yet being considered applicable to the states) because the proof did not demonstrate "beyond doubt" that death by electrocution was cruel and unusual. Kemmler, 136 U.S. at 442. The standard of proof required by the court for this

first challenge to electrocution, therefore, was the extraordinarily high "beyond doubt" standard, which would not apply to the § 1983 action at issue here.

The New York State Supreme Court and Court of Appeals affirmed the ruling of the county court, but on the grounds that the courts were not competent to second-guess the factual findings of the legislature with respect to the constitutionality of legislation.[13]

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[13]The New York Supreme Court stated that "there was nothing in the constitution of the government or in the nature of things giving any color to the proposition that, upon a mere question of fact involved in legislation, the judgment of the court is superior to that of the legislature itself, nor was there any authority for the proposition that in respect to such questions, relating either to the manner or the matter of legislation, the decision of the legislature could be reviewed by the court." Kemmler, 136 U.S. at 442-43. It (continued...)

This Court affirmed the decision of the New York Court of Appeals on the grounds that, because the New York legislature had determined that electrocution did not inflict cruel and unusual punishment and the New York courts had sustained that

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[13](...continued) held that the presumption that the legislature had ascertained the facts necessary to determine constitutionality "was conclusive upon the court," noting that it agreed that the evidence presented did not meet the standard of proof that would be required to overcome that presumption. Id.

The New York Court of Appeals affirmed the decision of its Supreme Court on similar grounds, holding that "[i]f it cannot be made to appear that a law is in conflict with the constitution, by argument deduced from the language of the law itself or from matters of which a court can take judicial notice, then the act must stand. The testimony of an expert or other witnesses is not admissible to show that in carrying out a law enacted by the legislature some provision of the constitution may possibly be violated." Id. at 443.

determination, New York had not abridged Kemmler's privileges or immunities, nor denied him due process of law. Id. at 449.

Since this Court's ruling in Kemmler, the federal courts and numerous states courts have cited that decision for the proposition that death by electrocution is not cruel and unusual. Although the law, scientific knowledge and society's sensibilities have developed and evolved considerably in the last one hundred years, casting serious doubt on the basic legal and scientific underpinnings of Kemmler, the decision has inexplicably endured as the basis for courts all over the land to uphold electrocution, regardless of the particular method, as a constitutional

means of execution. Modern medical and scientific evidence proves that Kemmler is no longer a viable foundation for the proposition that death by electrocution can never be cruel and unusual punishment.

The precedential value of Kemmler has eroded for several reasons. First, courts no longer defer to state legislatures in the way the New York state courts and United States Supreme Court deferred to the New York legislature in Kemmler. The Fourth Circuit, in Ralph v. Warden, Maryland Penitentiary, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972), upheld the authority of the federal courts to review a state legislature's decision generally, and specifically to

review a legislature's enactments regarding criminal punishment. In Ralph, the State of Maryland argued that capital punishment was a legislative decision with which the judiciary should not interfere. The Fourth Circuit rejected the State's argument, noting: "The fact that a Maryland statute authorizes capital punishment . . . does not conclusively establish the punishment's constitutionality, for the Eighth Amendment is a limitation on both legislative and judicial action." Id. at 788-89 (citing Robinson v. California, 370 U.S. 660 (1962)).

Second, to the extent that the New York courts were willing to consider evidence on the issue, Kemmler would have been required to prove "beyond doubt"

that death by electrocution was cruel and unusual in order to obtain relief. Kemmler, 136 U.S. at 442. However, in today's jurisprudence, courts apply a preponderance of the evidence standard for establishing an Eighth Amendment violation.[14] The constitutionality of execution by electrocution must be examined using a preponderance of the evidence standard.

Finally, scientific and medical knowledge and technology have made great strides since 1890. This Court has recognized that the Eighth Amendment is not a static concept but "must draw its meaning from the evolving standards of

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[14]See Blake v. Hall, 668 F.2d 52, 57-58 (1st Cir. 1981), cert. denied, 456 U.S. 983 (1982); Martin v. Foti, 561 F. Supp. 252, 257 (E.D. La. 1983).

decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958); Ralph v. Warden, 438 F.2d 786, 790-91 (4th Cir. 1971). Furthermore, it has recognized that what is cruel and unusual "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Gregg v. Georgia, 428 U.S. 153, 171 (1976) (quoting Weems v. U.S., 217 U.S. 349, 378 (1910)). In determining whether public opinion has changed, courts are not to impose their own "subjective judgment" but "look to objective indicia that reflect the public attitude toward a given sanction." Gregg, 428 U.S. at 173.

By consulting with experts in the advanced and progressing fields of

medicine and science, and through the discovery requests pursued in the course of his underlying litigation in the District Court, as well as by reviewing the changes other states are making with respect to capital punishment, Poyner has attempted to develop such "objective indicia" so that a modern judge, by examining modern technological evidence and applying modern legal standards, may reconsider the long-standing assumption that electrocution is not cruel and unusual. Poyner is trying to bring electrocution, and scrutiny thereof, into the twentieth century and into step with modern medical science and the "evolving standards of decency."

This Court in Brown v. Board of Education, 347 U.S. 483 (1954),

demonstrated that courts can, and often should, re-evaluate ancient precedents like Kemmler. In Brown, this Court refused to bind the nation and the federal judiciary to the outdated finding of Plessy v. Ferguson, 163 U.S. 537 (1896), that separate facilities for blacks and whites could be equal and were therefore constitutional. Instead the Court reexamined the issue of public school segregation in the context of contemporary circumstances and new revelations in the fields of sociology and psychology, stating:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Brown, 347 U.S. at 492-93. The Court looked to the psychological and sociological studies of Kenneth Clark and others, and held that "[t]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494 and n.11. This Court recognized that "[w]hatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority." Id. In Furman v.

Georgia, 498 U.S. 238, 285 (1972), the Court acknowledged the necessity to revisit timeworn assumptions when it stated that "past assumptions . . . are not sufficient to limit the scope of an examination of [the death penalty] today."

Poyner's Complaint in the District Court and Petition for writ of certiorari filed here, asks this Court to follow the path it took in Brown v. Board of Education. It asks the Court to reexamine the constitutionality of execution by electrocution in light of modern medicine and science and to free itself of the constraints imposed by findings of fact made over one hundred years ago when our understanding of the human central nervous system, the brain,

and the properties of electricity were primitive.

The District Court below, by examining modern technological evidence and applying today's legal standards, was prepared to reconsider the long-standing and obsolete assumption that electrocution is immune from constitutional review, but the Fourth Circuit extinguished the District Court's opportunity, ruling without allowing for the presentation of contrary evidence. Nevertheless, the constitutionality of electrocution is not, and cannot be, a closed debate given that the first, last, and only court to consider evidence of the effects of electrocution did so in the 19th century. Moreover, the Commonwealth of Virginia's recent changes

in its appliances and procedures dictate at least a hearing in some court to review the effects of those changes.

With the help of knowledgeable experts, Poyner is prepared to prove what modern science now knows about electrocution. This knowledge includes, for example, the excruciating pain suffered by the inmate as he actually burns and cooks during the electrocution process. In 1890, before the first execution by electrocution, the "experts" were unaware of this phenomenon. It was also presumed that the inmate was instantly unconscious as the electricity was applied, but Poyner's experts have exposed the fallacy of this assumption. Our understanding of electricity was in its infancy in late 19th century, and

medical science has advanced exponentially over 100 years. The time has come to analyze the constitutionality of Virginia's electric chair using this modern body of knowledge.

On February 11, 1993, the Circuit Court for Loudoun County agreed with Poyner's position and held that a Virginia court ought to hear evidence on this very issue:

> [L]ooking at all the Virginia cases that were cited to me . . . there's just, for some reason, some sort of a blind adherence to this rule that came up from the decision of the U.S. Supreme Court back in 1890, that it's not cruel and unusual punishment for execution by electrocution; and that that decision was made without any real findings of fact, without any real factual basis to support it.
>
> And it just seems to me that we are a country, we pride ourselves in our Constitution, both our U.S. Constitution, our State's Constitution, Virginia's Constitution, as being a

> **viable working document that is supposed to work with society as society's attitudes change over periods of time.**
>
> **And certainly science and technology has advanced an awful lot since 1890. And I feel somewhere a Court has got to hear the evidence of what the state of the art is now on the effect of electricity on the human body during the course of execution by electrocution in Virginia.**

Transcript, Commonwealth v. White, Circuit Court for Loudoun County, Crim. No. 8129 (February 11, 1993), at 4. (A82-A91). Thus, a Virginia court has now ruled that an evidentiary hearing is necessary and appropriate to determine whether execution by electrocution in Virginia violates the state and federal constitutional prohibitions on cruel and unusual punishments.

Kemmler is the decision on which all cases upholding electrocution as a

constitutionally sound means of execution rely. If that decision is determined to be flawed based on outdated factual determinations or legal principles, then all of its progeny must likewise fall. Poyner should be entitled to an evidentiary hearing to present evidence that the factual and legal bases supporting the Kemmler decision are outdated.

X.

PRAYER FOR RELIEF

For the reasons stated, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alexander H. Slaughter, hereby certify that I caused three (3) copies of the foregoing Petition for Writ of Certiorari to be delivered by hand on this 11th day of March, 1993 to John H. McLees, Esquire, Assistant Attorney General, Office of the Attorney General, 101 North 8th Street, Richmond, Virginia 23219, counsel of record for appellant below.

Alexander H. Slaughter
Counsel of Record

APPENDIX

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FILED 12/10/92

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SYVASKY L. POYNER, on behalf of himself and all others similarly situated, Plaintiffs, v. EDWARD W. MURRAY, Director, Virginia Department of Corrections, Serve On: Edward W. Murray, Director Virginia Department of Corrections 6900 Atmore Road Richmond, Virginia 23225; ELLIS B. WRIGHT, JR., Warden, Greensville Correctional Center, Serve On: Ellis B. Wright, Jr., Warden Greensville Correctional Center 901 Corrections Way Jarratt, Virginia 22387; and JOHN DOE, Executioner, Defendants.	)	CIVIL ACTION NO. 3:92 CV815

COMPLAINT

Syvasky L. Poyner, on behalf of himself and all others similarly situated, by counsel, for his Complaint seeking permanent injunctive and declaratory relief against Edward W. Murray, Director of Virginia Department of Corrections; Ellis B. Wright, Jr., Warden, Greensville Correctional Center; and John Doe, Executioner, states as follows:

I. PRELIMINARY STATEMENT

1. This is a class action filed by plaintiff, on behalf of himself and all other persons similarly situated both now and in the future, pursuant to 42 U.S.C. § 1983, seeking permanent injunctive and declaratory relief with respect to the unconstitutional procedure and means utilized by the defendants and prescribed

by the law of the Commonwealth for executing prisoners in Virginia.

2. Plaintiff in this action seeks to enjoin the deprivation by defendants, under the color of law, of rights of plaintiff and all other persons similarly situated protected by the Eighth and Fourteenth Amendments to the Constitution of the United States, and petitions the Court for an order declaring unconstitutional acts of defendants and Va. Code § 53.1-233 establishing electrocution as the means of carrying out capital punishment in the Commonwealth.

II. JURISDICTION AND VENUE

3. This Court has jurisdiction of this civil action under both:

(a) 28 U.S.C. § 1331, in that this action arises under the United States

Constitution, particularly the provisions of the Eight and Fourteenth Amendments; and

(b) 28 U.S.C. § 1343(3), in that this is an action brought to redress deprivations, under color of state law, of rights, privileges and immunities secured to the plaintiff and similarly situated persons by the Constitution of the United States of America.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the claims arose in this district in that executions by electrocution are carried out at the Greensville Correctional Center in Greensville, Virginia.

III. PARTIES

5. Plaintiff Syvasky L. Poyner is an inmate currently incarcerated at the Mecklenberg Correctional Center in

Boydton, Virginia. He is subject to five death sentences imposed by three circuit courts of the State of Virginia. No date has been fixed for his execution. However, pursuant to Va. Code § 53.1-232, his date of execution could be set at any time.

6. At all times relevant to this suit, defendant Edward W. Murray has been the Director of the Virginia Department of Corrections. He has acted and will act in such capacity as the agent, servant, and employee of the Commonwealth of Virginia in all actions he has taken and will take in deprivation of plaintiff's constitutional rights. He is sued individually and in his official capacity.

7. At all times relevant to this suit, defendant Ellis B. Wright, Jr., has

been the Warden of Greensville Correctional Center. He has acted and will act in such capacity as the agent, servant, and employee of the Commonwealth of Virginia in all actions he has taken and will take in deprivation of plaintiff's constitutional rights. He is sued individually and in his official capacity.

8. At all times relevant to this suit, defendant John Doe, an Executioner whose identity is not known to plaintiff, has been an employee of the Department of Corrections of Virginia. He has acted and will act in such capacity as the agent, servant, and employee of the Commonwealth of Virginia in all actions he has taken and will take in deprivation of plaintiff's constitutional rights. He

is sued individually and in his official capacity.

IV. CLASS ACTION

9. Plaintiff herein brings this action on behalf of himself and all other persons similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiff represents the class of all persons who have been or will be sentenced to die in Virginia's electric chair, currently located at the Greensville Correctional Center in Greensville, Virginia.

10. Joinder of all class members is impracticable because the proposed class is potentially too numerous; in addition, the class encompasses unknown future, as well as known present, prisoners facing execution by electrocution. Although the class consists of an indefinite and

uncertain number of members, identifying members is practicable because as death sentences are imposed, the identity of new class members will become known.

11. The allegations set out herein present questions of law and fact which are common to the class.

12. Plaintiff Poyner has standing to challenge Virginia's method of execution. His claim is typical of those of the unnamed members of the class.

13. Plaintiff Poyner has as much at stake in the outcome of this case as the unnamed members. He is represented by the law firms of Hunton & Williams and McGuire, Woods, Battle & Boothe. Poyner thus can adequately represent the interests of the class.

14. Since plaintiff seeks injunctive and declaratory relief against

the unconstitutional practices of the defendants in executing prisoners sentenced to death in Virginia by electrocution, class certification is proper pursuant to Rule 23 of the Federal Rules of Civil Procedure.

V. FACTUAL ALLEGATIONS

Count I

15. The Commonwealth of Virginia uses electrocution as its method of execution. Electrocution involves passing electrical current through the human body until the condemned person is dead. Electrocution was heralded as providing an instantaneous and hence humane and painless death when invented in the late nineteenth century, but modern medical and scientific evidence demonstrates that it provides neither. Execution by electrocution results in the

wanton and unnecessary infliction of pain: death by electrocution is tantamount to being burned or cooked alive.

16. The amount of electrical current (measured in amperes or amps) applied to the condemned person depends on the amount of voltage generated and the resistance (measured in ohms) offered by his body. This follows from Ohm's law that voltage equals current multiplied by resistance, a corollary of which is that current equals voltage divided by resistance.

17. In general, if the voltage applied to a resistor is too great, the latter will burn out or explode.

18. The objective of the Commonwealth in electrocuting the condemned person is to kill him without

causing his body to explode and without allowing the witnesses to see indicia of suffering on his part.

19. The defendants and the Commonwealth strap the condemned person into the chair at the arms, the trunk, and the legs. A mask is placed over his face so that the witnesses will not see the effects of the current reflected upon it. Moreover, the Commonwealth equips him with a diaper to prevent the witnesses from becoming aware of the effects of the electrical charge on his bladder and bowels.

20. The defendants and the Commonwealth apply one electrode to the condemned person's head, which has been shaved. Between the head and the electrode, the defendants and the Commonwealth place a sponge soaked in a

briny solution. The electrode is to pass current against the scalp of the subject, the sponge is to secure the contact and theoretically to alleviate burning of the scalp, and the brine is to improve the conductivity of the sponge.

21. A second electrode (with brine-soaked sponge) is placed on one of the subject's legs.

22. The defendants and the Commonwealth must recognize that the continuous and repeated application of electricity to a conscious human body is extremely painful, and that to apply electricity in such a manner intentionally would constitute cruel and unusual punishment within the meaning of the Eighth Amendment.

23. Therefore, the avowed objective of the defendants and the Commonwealth is

to pass sufficient current through the body and brain of the condemned person to render him brain dead or at least instantaneously unconscious without unduly disfiguring the body.

24. However, no one knows the amount of voltage needed to render the condemned person instantaneously unconscious, and the law of the Commonwealth leaves it up to the Director or his designee to determine how much voltage to use. It provides him with no guidelines in this respect.

25. No testing is done to determine the resistance of the body of the person to be electrocuted. Hence, the Director or his designee must guess at the amount of voltage to apply to the condemned person.

26. The human skull is a very poor conductor of electricity. Human skin is also a poor conductor, but sweat on the outside of the skin is an excellent conductor, given that it is essentially salty water.

27. Most, if not all persons strapped into the electric chair awaiting execution, sweat.

28. Electrical current seeks the path of least resistance. Therefore, a far greater portion of electrical current passes along the prisoner's skin than through his skull, body and brain as it travels to the electrode on his leg.

29. Hence, in spite of the voltage applied, relatively little current goes through the prisoner's brain.

30. The effect is to burn the condemned person's skin at extreme

temperatures while he is awake and conscious for an indeterminate period. Copies of photographs of the body of Robert Wayne Williams, executed in Louisiana, attached hereto as Exhibit 1, provide some understanding of the burns that can be inflicted by the electric chair. These photographs are still filed with the Court as exhibits in Bassette v. Commonwealth of Virginia, et al., Civil No. 3:92CV11.

31. The heat generated by the passage of current across the body eventually brings the blood to a boil and results in the brain being cooked.

32. The prisoner ultimately dies from asphyxia and cardiac arrest.

33. Sufficient current can be applied to a human being to kill him instantaneously. However, the amount of

current would be so great that the body would be very badly burnt and might well explode.

34. The Director or his designee therefore essentially guesses at the voltage that should be applied to kill the condemned person without creating a mess. Generally, the Director or his designee errs on the side of avoiding the latter.

35. The pain experienced by the condemned person is evidenced by:

(a) third-degree burns to the flesh;

(b) drooling and vomiting;

(c) defecation and urination;

(d) convulsions;

(e) grimaces and dilated pupils.

36. The painful effects of electrocution described above are

concealed from the spectators by the mask, diaper and restraints on the prisoner.

37. Because the nervous and motor systems of the body are separate, the muscles can be rendered immobile while the nervous system retains its ability to register pain. During the application of electricity, the condemned person's nervous system and brain remain relatively intact, allowing him to feel pain. His muscles, however, are fully contracted by the electrical shock. The involuntary contraction of the condemned person's muscles itself causes intense pain. After he lurches forward with the initial jolt of electricity (a phenomenon almost invariably noted by witnesses), he cannot move but can still feel the indescribable pain inflicted by the

electrical current traveling over and through his body.

WHEREFORE, plaintiff on behalf of himself and the class prays that the Court: (1) declare Va. Code Section 53.1-233 and the actions of the defendants unconstitutional in violation of the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment; and (2) enjoin the defendants from using electrocution as a method of carrying out death sentences.

Count II

38. The plaintiff alleges paragraphs 1 through 37 of Count I as it set out fully herein.

39. The defendants and the Commonwealth are deliberately indifferent to the fact that they are torturing the Commonwealth's condemned prisoners, as

they are aware or must be deemed to be aware of the facts set forth herein and have not even attempted to alleviate the resulting problems.

40. The technology of executing people by administering jolts of electricity externally to the head is antiquated. The defendants and the Commonwealth are aware of a large number of botched executions, both within and without Virginia.

41. The defendants and the Commonwealth are aware that the use of Virginia's chair has resulted in several gruesome executions. Flame and smoke erupted from the head of Frank J. Coppola when he was executed. More recently the executions of Wilbert Lee Evans and Derick L. Peterson were botched. Both men died prolonged, lingering, agonizing

deaths, as observed by eyewitnesses and reflected by the physical evidence. Blood and other bodily fluids gushed out from under Evans' mask during his execution, and his autopsy revealed burns not only at the points of the electrode contact, but on other parts of his body as well. Peterson was not killed by the first jolt of electricity, and witnesses observed him wheezing and moaning. It took the defendants and the Commonwealth over twelve minutes to execute Peterson.

42. In response to the botched execution of Peterson in August 1991, the defendants and the Commonwealth decided that in all future executions they would administer two separate two-minute series of electrical jolts. The defendants and the Commonwealth adopted this procedure because they recognized that the first

jolt of electricity often does not kill a condemned person and that death by electrocution is not immediate.

43. Moreover, the defendants and the Commonwealth do not know and cannot demonstrate that the condemned person is even rendered unconscious by the first jolt of electricity. Rather, modern medical and scientific evidence establishes that the condemned person is conscious and able to feel pain during the application of electrical current to his body.

44. Virginia's operating and testing procedures for its equipment are primitive. The operating procedures promulgated by the Department of Corrections provide that the brine solution in which the sponges are soaked shall consist of five gallons of water

and "approximately three (3) pounds of table salt." Commonwealth of Virginia Department of Corrections, Greensville Correctional Center, Institute Operating Procedures, IOP No. 426.1-7.4 April 1, 1991; see Exhibit 2. In order to determine whether the brine is sufficiently saline, the defendants and the Commonwealth place "a fresh egg in its shell in the solution. If the egg will float, the solution is correct." IOP No. 426.1-7.4, see Exhibit 2. The type of egg is presumably left to the discretion of the individual doing the testing. The testing of the saline solution could be done with a relatively cheap conductivity meter, which would presumably be more accurate than the floating "fresh egg" test.

45. The Commonwealth in the past has failed to provide requested information on the composition of the execution teams, and hence, the expertise of those persons cannot be gauged. However, a review of the relevant parts of the Institutional Operating Procedures (No. 426.1) reveals that no special expertise is required of its members. Moreover, the relevant part of the Institutional Operating Procedures (No. 426.1) does not (a) instruct on the handling of electrical malfunctions during the operation of the electric chair, (b) instruct on the proper placement of the electrodes, (c) provide for identification of any condition of the prisoner which might retard the flow of electric current or for the performance of calculations designed to

assure that the voltage used is sufficient to render the subject unconscious immediately, if that is possible.

46. The defendants and the Commonwealth have consistently misled the public and its legislature respecting the painful nature of electrocution, the antiquated technology applied, the primitive procedures used to test and administer the machinery, the failure to use personnel qualified by education or training to carry off the executions, the number of botched executions and the certainty of pain.

WHEREFORE, plaintiff on behalf of himself and the class prays that the Court: (1) declare Va. Code § 53.1-233 and the actions of the defendants unconstitutional in violation of the

Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment; and (2) enjoin the defendants from using electrocution as a method of carrying out death sentences.

SYVASKY L. POYNER
on behalf of himself and
all others similarly
situated

By /s/ Alexander H. Slaughter
Of Counsel

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EXHIBIT
1

January 6, 1992

Mr. Stuart A. Raphael
Hunton & Williams
Post Office Box 1147
Fairfax, Virginia 22030

Dear Mr. Raphael:

This is in response to your letter of December 31, 1991, renewing your request pursuant to the Freedom of Information Act (FOIA), for photographs, diagrams, engineering drawing, electrical schematics and/or blueprints of the death chamber or electric chair. You further request the Institutional Operating Procedures (IOP) on execution. These records and documents, you contend, are not exempted by Section 2.1-342(B)(32).

You state that it is difficult to conceive how photographs and electrical schematics of the electric chair itself would jeopardize the security of the facility at Greensville. Those documents, in the hands of a person with the appropriate knowledge, could be used to sabotage the operation and lead to a potential escape. Further, the location of the electrical conduits could lead to sabotage by persons within the prison or on the outside of the facility.

We will continue to object to the release of schematics, diagrams, etc., of the Greensville facility under Section 2.1-

EXHIBIT 2

342(B)(32). We will, however, enclose the diagrams and schematics of the facility at the Virginia State Penitentiary. Since that facility is no longer in existence and the electronics of the unit have now been totally changed, they now present no security threat. I note that your original request #8 requested diagrams, etc., of <u>the</u> death chamber or electric chair, this request was read to mean the current death chamber.

While your letter is aimed at items 8-11 of your November 27, 1991, FOIA inquiry, you seem to further question the withholding of IOPs on executions. While you have not asked for those IOPs in your most recent correspondence, we have decided to furnish you with them without your formal request. We have, however, redacted certain sections of those documents pursuant to Section 2.1-342(A)(3). The reasons for individual redactions will be explained as to each particular document.

Institutional Operating Procedure 426 relates to the procedures for carrying out death sentences. We have made the following redactions to this document:

426-7.3 -	(Last sentence) - Explains where records of the inmate will be held.
426-6.2 -	Explains security in the confinement area.

426-6.4(1) - Explains where the security team will muster.

(5)(b) - Explains security procedures for witnesses.

(5)(d) - Explains security responsibility for enforcing instructions.

426-6.7 - Explains where the institutional records of condemned will be maintained.

Institutional Operating Procedure 426.1 relates to the duties and responsibilities of the execution team. We have made the following redactions to this document:

426.1-7.0 - Explains the make-up and numbers of the execution team.

426.1-7.5(1) - Explains the duty and number of personnel in relation to the execution.

(2) - Explains the time and place for muster of personnel.

(16) - Explains who activates the cycle on the electric chair.

You should note that #18 calls for a two (2) minute cycle. This procedure is

being changed to a ninety (90) second cycle for the next execution.

Institutional Operating Procedure 426.2 relates to the duties and responsibilities of the death watch person(s). We have made the following redactions to this document:

426.2.7.2(2) - Explains the duties and movement of the death watch team.

426.2.7.2(4) - Explains certain duties of the death watch team.

(9) - Explains movement and location of inmate.

(12) - Explains the duty schedule and personnel requirements of the death watch team.

Taken together these three IOPs make up the procedure for carrying out an execution. The redactions have been made pursuant to Section 2.1-342(B)(32). The number of personnel, their location and their particular duties relate directly to security. Providing these facts would jeopardize the security of the institution by providing information that could be used in an escape attempt or to disrupt the institution. As you know, six inmates escaped from the death row at Mecklenburg Correction Center even though

they had none of this information. The Department of Corrections, in keeping with its responsibility to the citizens of the Commonwealth, must take every step possible to prevent a recurrence of that event.

Institutional Operating Procedures 426, 426.1 and 426.2 existed for the Virginia State Penitentiary. Those IOPs were updated when the facility moved to Greensville but present the same information. They have not been provided because of duplication of effort, as the same paragraphs would be redacted.

I trust this further material satisfies your request. While we have made every effort to provide as much information as possible to you within the parameter of the FOIA, I am sure you will agree that the security of the facility is paramount.

Please feel free to contact me, if I can be of further assistance.

Sincerely,

/s/ Edward W. Murray

Edward W. Murray

EWM:gcg

PART II

PROCEDURES

426-7.0 PROCEDURES

426-7.1 Place of Confinement

1. Persons for whom the death sentence has been pronounced, shall be conveyed to the Greensville Correctional Center, or to other confinement facilities by Police agencies having jurisdiction of the court where sentence was handed down.

2. Upon arrival at the confinement facilities, the inmate will be strip-searched and issued a complete issue of clothing allowed in the cell. (See post orders for clothing and articles allowed.)

3. Upon completion of the requirements in 2 above, the inmate will be confined in an individual cell. Only one (1) inmate may be confined in each cell.

4. The institution's I.D. Officer will go to place of confinement, photograph and fingerprint the inmate upon instructions from the Warden, or his designee. [Redacted].

426-6.2 Security Within the Confinement Area

1. [Redacted].
2. [Redacted].
3. [Redacted].

426-6.3 Maintenance of Death Chamber

1. The maintenance of the Death Chamber and appliances for the execution of felons will be the responsibility of the Officer-in-Charge of the Execution Team. (See I.O.P. #426.1).

2. The general maintenance of the housing unit will be coordinated through the institution maintenance section.

426-6.4 Selection, Composition and Training of the Execution Team

1. [Redacted].

2. The Execution Team members shall be selected from

Division of Adult Institutional Services' employees.

3. The Warden of Greensville Correctional Center will have the responsibility for making the final decision.

4. The criteria for selection of Team members will be based on job specification.

5. The training of the Execution Team shall be the responsibility of the Officer-in-Charge of the Team.

426-6.5 Correspondence and Notification Requirements

1. Thirty (30) days prior to the scheduled execution, the Warden shall prepare for the Department of Corrections Director's signature, a letter to the Governor and the Attorney General of the Commonwealth informing them:

   a. The location of the inmate prior to 30 days of the execution date and a follow-up

letter at 15 days, or when the inmate is received at Greensville.

b. The date set by the court for the inmate's execution.

c. The execution will take place as scheduled <u>unless</u> directed otherwise by a competent Judicial or Executive authority.

2. Four (4) days before the scheduled execution, the Warden of Greensville Correctional Center shall notify the following persons of the <u>inmate's name</u> and <u>number</u> and the <u>date</u> and <u>time</u> scheduled for the execution:

a. The Director of the Department Corrections.

b. The Deputy Director of Adult Institutional Services.

c. The Regional Administrator of Region IV (Eastern).

d. The Chief Physician of the Department of Corrections.

e. The Manager, Classification and Records Unit.

f. The Bureau of Public Information.

g. The Assistant Attorney General assigned to the Department of Corrections.

h. The Execution Team.

i. The Sheriff, Greensville County.

j. Superintendent, State Police.

k. The witnesses selected for the execution.

3. The day before the execution:

a. The Execution Team will carry out its responsibilities and make an oral report to the Warden of the state of readiness. (See I.O.P. #426.1

for details of preparation.)

b. The Security Staff of Greensville Correctional Center will be briefed on security requirements on execution day by the Chief of Security and/or Warden.

426-6.6 Requirements on the Day of Execution

1. The Warden will be briefed and he will assign the Death Watch Team 24 hours before time set for the execution. (See I.O.P. #426.2 for Duties of Death Watch Team.)

2. [Redacted] stand-by requirement will begin 12 hours before the scheduled execution and remain on stand-by until dismissed by the Warden, or his designee.

3. A representative of the Virginia State Police will be located in the Warden's office, if the Administration feels there is a need. The reporting time and duration of this

requirement to be announced.

4. Representatives of the news media shall be assembled in a pre-designated location under the direction of the Greensville Correctional Center Public Information Officer.

5. The Warden, or his designee, will receive and brief the witnesses upon their arrival at Greensville Correctional Center.

a. They are to be properly identified to insure that only authorized persons witness the execution and require them to sign required documents.

b. [Redacted].

c. Witnesses will be escorted to the witness booth by the Warden, or his designee, 15 minutes before the time of the execution.

d. [Redacted].

426-6.7 Records and Reports

1. [Redacted].

2. All log books maintained on each inmate housed in the Execution Chamber, or other location, shall be turned in to the Warden's office when there is a need for the books to be replaced and/or after the death sentence has been carried out.

PART III

ADMINISTRATION

426-7.1 OFFICE OF PRIMARY RESPONSIBILITY

The Warden of Greensville Correctional Center shall hold primary responsibility for maintaining a permanent Death Chamber within the confines of Greensville Correctional Center and coordinating the execution of condemned inmates.

426-7.2 SUPERSESSION

This is the first issue of this Institutional Operating Procedure.

426-7.3 REFERENCES

Code of Virginia, Sections 53.1-232 to 53.1-236

426-7.4 REVIEW DATE

This Institutional Operating Procedure shall be reviewed and revised accordingly by October 1, 1991.

/s/ E. M. Grizzard
E. M. Grizzard
Warden

6-14-91
Date

J. A. Smith, Jr.
Regional
Administrator

Date

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF CORRECTIONS

GREENSVILLE CORRECTION CENTER

INSTITUTIONAL OPERATING PROCEDURES

IOP NUMBER: 426.1 DATE: April 1, 1991

PAGE 1 OF 5 PAGES

SUBJECT: Duties and Responsibilities of the Execution Team

PART I

GENERAL PROVISIONS

426.1-1.0 PURPOSE

This will prescribe the duties and responsibilities of the Execution Team Members in carrying out the Death Sentence.

426.1-2.0 AUTHORITY

Code of Virginia, Section 53.1-232 to 53.1-236.

426.1-3.0 EFFECTIVE DATE

April 1, 1991

426.1-4.0 DISCUSSION

426.1-5.0 APPLICABILITY

This Operating Procedure applies to all members of the Execution Team.

426.1-6.0 DEFINITIONS

None

PART II

PROCEDURES

426.1-7.0 PROCEDURES

426.1-7.1 EXECUTION TEAM COMPOSITION

[Redacted].

426.1-7.2 TRAINING

The Officer-in-Charge and/or the Assistant Officer-in-Charge shall conduct a training session at least once each month at which time all appliances and electrical circuits will be tested.

426.1-7.3 The four (4) days before a scheduled execution, the Officer-in-Charge and/or his assistant will assemble the Execution Team in the Death Chamber area to prepare and test all appliances and equipment for the scheduled execution.

426.1-7.4 The day before a scheduled execution the following preparations will be made:

1. Set up the cooling board in room provided for same.

2. Insure that a minimum of ten (10) sandbags, filled with sand, are available in the cooling room.

3. Obtain two (2) clean bed sheets and six (6) clean hand towels and store in room with cooling board.

4. Soak head piece and leg pieces in clear cold water for at least three (3) hours before being removed and place in brine solution.

5. Mix five (5) gallons of water and approximately three (3) pounds of table salt to form brine.

6. Check the solution by placing a fresh egg in its shell in the solution. If the egg will float, the solution is correct.

7. Insure that 12 non-cushioned straight back chairs are placed in the witness room.

8. Upon completion of the preparation stage, the Officer-in-Charge and/or the Assistant Officer-in-Charge will make an oral report to the Warden as to the state of readiness of equipment, appliances and Death Chamber.

426.1-7.5 Prior to, but not more than 24 hours before the day of execution, the Execution Team will carry out the following instructions under the direction of the Officer-in-Charge and/or the Assistant Officer-in-Charge:

1. [Redacted].

2. [Redacted].

3. Insure that all equipment is properly placed.

4. The Officer-in-Charge and/or Assistant Officer-in-Charge will set the test board on the chair and test circuitry. The test board will be left on the chair upon completion of first circuitry test.

5. The two (2) members assigned to the head and leg pieces are to remove same from the clear water,

squeeze excess water from them and place the head and leg pieces in the brine solution and add ice, one and a half hours (1 1/2 hours) prior to the execution.

6. Fifteen minutes before the scheduled execution, the designee will activate the telephone. He/she will call the number where the Governor is located, get an assistant assigned by the Governor on the phone and keep the line open until the execution is over.

7. The Officer-in-Charge will retire to the controls after ascertaining all is in order for carrying out the execution.

8. After the witnesses are seated, circuitry is tested by the Assistant Officer-in-Charge. Upon completion of the test, the test board will be removed and stored in controls.

9. The two (2) Team members assigned to the head and leg pieces will remove same from brine, squeeze

out excess liquid and place on drain board on orders of the Assistant Officer-in-Charge.

10. The Warden, or his designee, will read the Court Order to the inmate and ask if he has any last words.

11. The three (3) Team members assigned the duties of escorting the condemned inmate to the chair will do so upon instructions from the Assistant Officer-in-Charge.

12. The inmate will be escorted to the chair, strapped in the chair, head and leg pieces and face mask secured by Team members previously assigned those duties, under the direction of the Assistant Officer-in-Charge.

13. When all straps and appliances are secured, all members of the Team will dry their hands and retire to post where the safety key is located.

14. The designee on the phone, in contact with the

Governor's assistant, will give the all clear signal to the Warden possessing the key for the circuitry.

15. Upon receipt of the all clear signal, the key will be inserted by the Warden, activate the circuitry and signal to the Officer-in-Charge to proceed.

16. [Redacted].

17. When the cycle has been completed, the Officer-in-Charge will signal to the Warden who will deactivate the circuitry and remove the key.

18. After the key has been removed, the Warden will wait <u>two (2) minutes</u> then signal the physician in attendance.

19. After the physician pronounces the inmate dead, the Warden will inform the Director that the sentence has been carried out.

20. After the physician pronounces the inmate dead, the witnesses will be escorted out by the Warden, or his designee.

21. The body will be removed by the Execution Team and placed on a sheet on the cooling board. The body will be covered with the second sheet and sand bags placed on thighs, knees and arms.

22. The body will be removed from Greensville Correctional Center when instructed to do so by the Warden. The body will be transported to the State Morgue for further disposition.

23. The Execution Team, under the direction of the Officer-in-Charge, will store all equipment in the proper location, secure the Death Chamber and report to the Warden's office for additional instructions.

<u>PART III</u>

<u>ADMINISTRATION</u>

426.1-8.1 <u>OFFICE OF PRIMARY RESPONSIBILITY</u>

The Officer-in-Charge and/or the Assistant Officer-in-Charge will be responsible to the Warden of Greensville

Correctional Center for the care and maintenance of the Death Chamber and all appliances and equipment; the training of the Execution Team and carrying out the execution of the condemned inmate.

426.1-8.2 SUPERSESSION

This is the first issue of this Institutional Operating Procedure.

426.1-8.3 REFERENCES

Code of Virginia, Section 53.1-232 to 53.1-236.

426.1-8.4 REVIEW DATE

This Institutional Operating Procedure shall be reviewed and revised accordingly by October 1, 1991.

/s/ E. M. Grizzard
E. M. Grizzard
Warden

6-14-91
Date

_____
J. A. Smith, Jr.
Regional Administrator

_____
Date

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF CORRECTIONS

GREENSVILLE CORRECTION CENTER

INSTITUTIONAL OPERATING PROCEDURES

IOP NUMBER: 426.2 DATE: April 1, 1991

PAGE 1 OF 4 PAGES

SUBJECT: Duties and Responsibilities of the Death Watch Person(s)

PART I

GENERAL PROVISIONS

426.2-1.0 PURPOSE

This will prescribe the duties and responsibilities of the person(s) assigned to the Death Watch Duties.

426.2-2.0 AUTHORITY

Code of Virginia, Section 53.1-232 to 53.1-236

426.2-3.0 EFFECTIVE DATE

April 1, 1991

426.2-4.0 DISCUSSION

426.2-5.0 APPLICABILITY

This Institutional Operating Procedure applies to those members of the Execution Team designated to perform Death Watch duties.

426.2-6.0 DEFINITIONS

None

PART II

PROCEDURES

426.2-7.0 PROCEDURES

426.2-7.1 DEATH WATCH COMPOSITION

[Redacted]

426.2-7.2 DUTIES AND RESPONSIBILITIES

1. Report to the Warden 24 hours before the time set for the execution.

2. [Redacted]

3. Communicate request for religious counseling, medical needs, telephone use, visits, etc. to the Warden or his designee for decision.

4. [Redacted]

5. Place a clean change of bed linen (2 sheets and pillow case), change of underwear, trousers and shirt.

6. Take the last meal menu request from the inmate and submit the request to the Warden or his designee.

7. Serve the last meal to the inmate about four (4) hours before the scheduled execution.

8. Upon completion of the serving of the meal, remove the inmate from the assigned cell and shave his head with clippers.

9. [Redacted]

10. Upon completion of requirement outlined above, make an oral report to the Warden.

11. One (1) member of the Death Watch may retire at this time.

12. [Redacted]

426.2-7.2 GENERAL DUTIES AND RESPONSIBILITIES

1. The Death Watch member on duty will position himself where he has constant observation of the inmate.

2. In the event the inmate attempts to harm himself, the Death Watch Member on duty will alert the regular officer on duty and take whatever action is necessary to correct the situation.

3. Prepare and submit a written report in detail to the Warden at the conclusion of the Death Watch mission.

4. Contact the Warden or his designee in any situation not covered by written or oral instruction.

PART III

ADMINISTRATION

426.2-8.1 OFFICE OF PRIMARY RESPONSIBILITY

The Death Watch person(s) will be responsible to the Warden of Greensville Correctional Center for the security and protection of the condemned inmate from harming himself or harm from

other person(s), serving of the last meal, communicating with the Warden on the last request of the inmate and supervision of preparing the inmate for the execution.

426.2-8.2 SUPERSESSION

This is the first issue of this Institutional Operating Procedure.

426.2-8.3 REFERENCES

Code of Virginia, Section 53.1-232 to 53.1-236

426.2-8.4 REVIEW DATE

This Institutional Operating Procedure shall be reviewed and revised accordingly by October 1, 1991.

E.M. Grizzard Warden	J. A. Smith, Jr. Regional Administrator
Date	Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SYVASKY L. POYNER, on behalf of himself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 92CV815
EDWARD W. MURRAY, Director, Virginia Department of Corrections, ELLIS B. WRIGHT, JR., Warden, Greensville Correction Center, and JOHN DOE, Executioner,	)	
Defendants.	)	

ORDER

For the reasons stated in the accompanying Memorandum, and deeming it just and proper so to do, it is Adjudged and Ordered that the Plaintiff's motion for expedited discovery and his motion to compel are hereby GRANTED, except as they pertain to the request to videotape the

execution of Charles Stamper, which portion of said motion is hereby DENIED.

Let the Clerk send copies of this Order and the accompanying Memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

1/19/93
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SYVASKY L. POYNER, on behalf of himself and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 92CV815
EDWARD W. MURRAY, Director, Virginia Department of Corrections, ELLIS B. WRIGHT, JR., Warden, Greensville Correction Center, and JOHN DOE, Executioner,	)	
Defendants.	)	

MEMORANDUM

This matter is before the Court on the Plaintiff's motion for expedited discovery and the Defendant's related motion for a protective order pending a ruling on their motion to dismiss. The Plaintiff makes three separate and

independent discovery requests, all related to the execution of Charles S. Stamper, currently scheduled to take place on January 19, 1993. The parties argued their respective discovery motions before this Court on January 15, 1993.

On December 10, 1992, Mr. Poyner, on behalf of himself and all others similarly situated, filed a Complaint in this Court against Edward W. Murray, Director, Virginia Department of Corrections, Ellis B. Wright, Jr., Warden, Greensville Correctional Center, and John Doe, Executioner, seeking permanent injunctive and declarative relief pursuant to 42 U.S.C. § 1983 with respect to the alleged unconstitutional procedure and means utilized by the Defendants and prescribed by the law of the Commonwealth of Virginia for executing prisoners in Virginia. On

December 10, 1992, this Court Ordered the Defendants to allow a representative of the Plaintiff to enter the Execution Chamber of the Greensville Correctional Center and film the execution of Timothy Bunch. At that time, this Court also ruled that the Plaintiff could have a representative present at the routine autopsy of Mr. Bunch. Both of these measures were Ordered for the furtherance of discovery in this class action now before this Court. This compelled discovery was narrowly tailored in an attempt to avoid interfering with the state's execution procedures.

The Defendant promptly appealed this Court's decision to the Fourth Circuit Court of Appeals, and on December 10, 1992, in In Re Ellis B. Wright, No. 92-7229 (4th Cir. Dec. 10, 1992), the Fourth

Circuit reversed this Court's ruling that allowed the Plaintiff in this action to videotape the execution of Timothy Bunch. Although this Court viewed the Order allowing the Plaintiff to videotape the Bunch execution as a discovery procedure specifically designed to avoid interfering with the execution, the Fourth Circuit found that the presence of a video camera did present an interference and cast grave doubt on whether this Court had any jurisdiction to act on that premise. Additionally, the appellate court Ordered, subsequent to the death of Timothy Bunch, all relief requested by the motion of December 10, 1992, Dismissed as moot.

The subject matter jurisdiction of this Court has not been challenged by the parties, and the Court is reasonably satisfied of its jurisdiction to decide

the ultimate issue. There is no dispute that if this Court has jurisdiction over the case, this Court has jurisdiction over disputed discovery. See, e.g., Fed. R. Civ. P. 37 (a)(1).

The Plaintiff again requests this Court to compel, inter alia, the videotaping of the execution of Charles Stamper. For the reason stated from the Bench at the hearing on January 15, 1993, and giving proper deference to the Fourth Circuit's opinion in In Re Ellis B. Wright, supra, this request must be Denied.

The Plaintiff also requests this Court to compel the videotaping of a routine pre-execution testing of the electric chair at the Greensville Correctional Center. The Defendant's only potentially relevant objection to allowing

this discovery is that if done on the same day as the execution it may collaterally interfere with the execution preparation or procedure. This Court finds that it is not necessary for this test, or its videotaping, to be performed on the same day scheduled for an execution. Therefore, the Defendants shall be compelled to allow the Plaintiff's representatives to observe and videotape a routine preexecution testing of the electric chair at Greensville Correctional Center at a mutually agreeable time no later than twenty (20) days from the date of this Memorandum.

Finally, the Plaintiff requests that this Court compel the Defendants to allow the Plaintiff's representative, Dr. E. B. Ilgren, an eminent neuropathologist, to observe the routine autopsy following the

execution of Charles Stamper. Further, the Plaintiff request that Dr. Ilgren be allowed to collect samples of the executed inmate's brain tissue after it is removed and sectioned by the Defendants' pathologist. The Defendants can not show how passive observation of a routine autopsy can in any way interfere with the scheduled execution. For this reason, the Plaintiff will be allowed to have his expert representative present to observe the autopsy. Similarly, the Plaintiff's request that Dr. Ilgren be allowed to conduct one separate and independent test merely requires Dr. Ilgren to collect minimal samples from tissue that already will be removed and sectioned in the course of the regularly scheduled autopsy. The Court fails to see how this can possibly interfere with the Defendant's

routine or plans concerning the scheduled execution.

The Defendants' assert a misplaced objection that the discovery material requested by the Plaintiff may not be dispositive or even admissible in a trial on the merits. It is well settled that in order to be discoverable, the information sought need only appear reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26 (b) (1). The Court must also consider the limited and unique opportunity for discovery presented with each scheduled execution and the potential irreparable harm of allowing discovery to become unduly delayed. Accordingly, the Plaintiff's motion for expedited discovery and his motions to compel will be granted, except as they pertain to his request to

videotape the execution of Charles Stamper.

An appropriate Order shall follow.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

1/19/93
Date

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SYVASKY L. POYNER, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs

v. **Civil Action No. 92-CV-815**

EDWARD W. MURPHY, et al.

Defendants

NOTICE OF APPEAL

Notice is hereby given that Defendants Edward W. Murray, et al., hereby appeal to the United States Court of Appeals for the Fourth Circuit from the order entered in this case on January 19, 1993, granting the plaintiffs discovery with respect to the autopsy of Charles S. Stamper.

Respectfully submitted,

EDWARD W. MURRAY, Director
Virginia Department of
Corrections, et al.,

Defendants herein,

By: /s/ Mark R. Davis
Counsel

FILED: January 19, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-6052

SYVASKY LAFAYETTE POYNER, on behalf of himself and all others similarly situated,

Plaintiffs - Appellants,

versus

EDWARD W. MURRAY, Director, Virginia Department of Corrections, ELLIS B. WRIGHT, JR., Warden, Greensville Correctional Center, and JOHN DOE, Executioner,

Defendants - Appellees.

O R D E R

The defendants have appealed from a part of an order of the district court entered at 3:00 p.m. January 19, 1993, granting a discovery request pertaining to

the execution of Charles S. Stamper, who has been ordered to be executed by electrocution on January 19, 1993. We are advised that such executions take place in Virginia at 11:00 p.m.

The order of the district court further specifically requires the defendants to allow Dr. E. B. Ilgren to observe "the routine autopsy following the execution of Charles Stamper." The order further implicitly requires the defendants to furnish to Dr. Ilgren tissue samples from Stamper's brain tissue "after it is removed and sectioned by the defendants' pathologist."

In this case of considerable public interest, the order of the district court is not any routine discovery order but is, in fact, an injunction and we treat it as such. There is no doubt that a refusal to

comply with the district court's order of January 19, 1993 would be punishable by contempt.

We have examined the papers in the underlying case of Poyner v. Murray, No. 92-CV815. That case essentially contests the validity of the Virginia statutes requiring execution by electrocution as being invalid in violation of the Eighth Amendment because electrocution is cruel and unusual punishment.

This exact question has been decided adversely to Poyner's position by the Supreme Court of Virginia in Martin v. Commonwealth, 271 S.E.2d. 123 (Virginia 1980), a case occurring after Robinson v. California, 370 U.S. 660 (1962) and Hart v. Commonwealth, 109 S.E.2d 582 (Virginia 1921) prior to Robinson. The Virginia Court has refused to reconsider the

question in Stockton v. Commonwealth, 402 S.E.2d 196 (Virginia 1991), Hoke v. Commonwealth, 377 S.E.2d 595 (Virginia 1989), Stockton v. Commonwealth, 314 S.E.2d 371 (Virginia 1984), Townes v. Commonwealth, 362 S.E.2d 650 (Virginia 1987), and Beaver v. Commonwealth, 352 S.E.2d 342 (Virginia 1987).

WestLaw indicates at least 105 state cases in 13 jurisdictions which state or hold that electrocution is not an unconstitutional means of execution.

Two circuits, the Fifth and Eleventh, have held and stated that electrocution is not a method of execution in violation of the Eighth amendment, and two other circuits, the Fourth and Eighth, have noted in dictum that the Supreme Court approved of electrocution as a form of

execution in In Re: Kemmler, 136 U.S. 436 (2890).

Jones v. Whitley, 938 F.2d 536 (5th Cir.), cert. denied, 60 U.S.L.W. 3108 (1991)

Lindsey v. Smith, 820 F.2d 1137, 1155 (11th Cir. 1987) cert. denied, 495 U.S. 1059 (1989);

Lowenfield v. Phelps, 817 F.2d 285 (5th Cir.) cert. granted in part, 483 U.S. 1005 (1987), aff'd, 484 U.S. 231 (1988);

Wilson v. Butler, 813 F.2d 664, 678 (5th Cir.) cert. denied, 440 U.S. 976 (1979)), on reh'g, 825 F.2d 879 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988);

Porter v. Wainwright, 805 F.2d 930, 943 n.15 (11th Cir. 1986) cert. denied, 482 U.S. 918, and cert. denied, 428 U.S. 919 (1987) ;

Funchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir.) (per curiam) cert. denied, 475 U.S. 1133 (1986);

Johnson v. Kemp, 759 F.2d 1503, 1510 (11th cir. 1985)

Watson v. Blackburn, 756 F.2d 1055, 1058 & n.1 (5th Cir. 1985) (per curiam) cert. denied, 476 U.S. 1153 (1986);

Sullivan v. Dugger, 721 F.2d 719 (11th Cir. 1983) (order)

Corn v. Zant, 708 F.2d 549, 563 (11th Cir. 1983) cert. denied, 467 U.S. 1220 (1984), vacated in part on other grounds, 772 F.2d 681 (11th Cir. 1985), vacated in part on other grounds, 478 U.S. 1016 (1986), on remand, 837 F.2d 1474 (11th Cir.), cert. denied, 486 U.S. 1023 (1988);

Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978) cert. denied, 440 U.S. 976 (1979);

Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970) (noting in dictum that Kemmler approved of electrocution as a form of execution), cert. denied, 408 U.S. 942 (1972);

Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (Blackmun, J.)

Kemmler held that a New York statute authorizing execution by electrocution was not invalid as against the due process clause. New York's constitution had a provision against cruel and unusual punishment, the same as the Eighth Amendment, and the New York courts had

upheld the execution as measured against the New York Constitution. As measured against the U. S. Constitution, of course narrowly read, Kemmler only holds that there was no violation of due process. Kemmler has been construed, however, by the Supreme Court albeit in dictum on the subject, as stating that electrocution is not cruel and unusual punishment under the Eighth Amendment. McClesky v. Kemp, 481 U.S. 279 (1987), Ingraham v. Wright, 430 U.S. 651 (1977), and Estelle v. Gamble, 429 U.S. 97 (1976).

Additionally, to like effect, are the opinions of Justice Powell, dissenting in Rummell v. Estelle, 445 U.s. 263, 288, and a plurality opinion in Gregg v. Georgia, 428 U.S. 153 (1976).

In addition, the Supreme Court has specifically held in Louisiana etc. v.

Resweber, 329 US. 459 (1947) that it was not cruel and unusual punishment to attempt a second execution when the first failed because of mechanical problems with the electric chair. Notably, the court stated that "[t]here is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed electrocution." 329 U.S. and 464.

In the face of all this authority, there is no contrary decision.

Accordingly, we are of opinion that the basic premise in the underlying case in the district court is entirely without merit.

It is accordingly ADJUDGED and ORDERED that the order of the district court entered January 19, 1993 and herein appealed from, shall be, and the same hereby is, reversed.

It is FURTHER ADJUDGED and ORDERED that this case shall be, and the same hereby is, remanded to the district court with directions to forthwith dismiss with prejudice the underlying case, Poyner v. Murray, No. 92-CV815. Deckert v. Independence Corp., 311 U.S. 282, 287 (1940); South Carolina ex rel. Tindal v. Block, 717 F.2d 874, 880 (4th Cir. 1983), Wright, Miller, Cooper and Gressman, Federal Practice and Procedure, 1977 § 3921.

Let our mandate issue forthwith.

With the concurrences of Judge Wilkinson and Judge Sprouse.

/s/ H. E. Widener, Jr.
U. S. Circuit Judge
For the Court

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 19, 1993

No. 93-6052
CA92-815-V

Poyner v. Murray

M A N D A T E

The order of this Court dated 1/19/93 takes effect today.

BERT M. MONTAGUE
CLERK

FILED
February 17, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-6052

SYVASKY LAFAYETTE POYNER,
on behalf of himself and all
those similarly situated,

Plaintiff-Appellant,

versus

EDWARD W. MURRAY, Director,
Virginia Department of Corrections,
ELLIS BE. WRIGHT, JR., Warden,
Greensville Correctional Center,
and JOHN DOE, Executioner,

Defendant-Appellee.

O R D E R

There having been no request for a poll of the court, it is accordingly ADJUDGED and ORDERED that the petition for

rehearing en banc shall be, and it hereby is, denied.

We have considered the petition for rehearing and are of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is denied.

It is FURTHER ADJUDGED and ORDERED that the petition for a recall of the mandate shall be, and it hereby is, denied.

The effect of the entry of this order is to grant Poyner's motion for expedited consideration of his petition for rehearing and petition for recall of the mandate, although, as is apparent from this order, the same are denied on their merits.

With the concurrences of Judge Wilkinson and Judge Sprouse.

/s/ H. E. Widener, Jr.

For the Court

V I R G I N I A

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA,	:	
Plaintiff,	:	
v.	:	Criminal No. 8129
CURTIS EUGENE WHITE,	:	
Defendant.	:	

Thursday, February 11, 1992

An EXCERPT of a hearing held in the above-styled matter in the Circuit Court for Loudoun County, Virginia, in the courthouse thereof, Leesburg, Virginia, before the Honorable JAMES H. CHAMBLIN, Judge of said Court, beginning at approximately 2:13 p.m.

A P P E A R A N C E S

On Behalf of the Commonwealth:

William T. Burch, Commonwealth's Attorney

Owen D. Basham, Assistant Commonwealth's Attorney

John H. McLees, Jr., Assistant Attorney General

On Behalf of the Defendant:

Jud A. Fischel, Esquire

Alexander H. Slaughter, Esquire
McGuire, Woods, Battle & Boothe

Harry M. Johnson, III, Esquire
Hunton & Williams

P R O C E E D I N G S

THE CLERK: Commonwealth of Virginia v. Curtis Eugene White, Criminal File No. 8129.

THE COURT: Good afternoon, everybody.

I trust by you all being here that you got the message from my Assistant, that I have denied the Motion for Reconsideration in this case, and the hearing will go forward on the 22nd.

If I could just take a couple of minutes, somewhere along the line I would like, if I have time, but just because of the press of all the other cases on the docket of this Court, to somewhere put in the record as to why I feel the defendant is entitled to the hearing on this; and also so there is no misunderstanding as to

exactly what the Court is going to allow Mr. White to try to show.

To answer the second part first, it has never, ever been my intention that this motion to prohibit the imposition of the death penalty in this case was to be an attack on electrocution as a means of execution in a general sense. It was only meant to be an attack upon the way it is done in Virginia. I don't know whether that has ever been said by me from the Bench. I tried to put that into words in the Order that I entered in the latter part of December. But I just want to make sure that everybody understands that. And I think that everybody does, primarily based upon what Mr. Johnson said when we were here two days ago.

But just briefly, several reasons why I feel that this ought to be raised:

First of all, I went back, and looking at all the Virginia cases that were cited to me, and it seems to me that it is true, there's just, for some reason, some sort of a blind adherence to this rule that came up from the decision of the U.S. Supreme Court back in 1890, that it's not cruel and unusual punishment for execution by electrocution; and that that decision was made without any real findings of fact, without any real factual basis to support it.

And it just seems to me that we are a country, we pride ourselves in our Constitution, both our U.S. Constitution, our State's Constitution, Virginia's Constitution, as being a viable working document that is supposed to work with society as society's attitudes change over periods of time.

And certainly science and technology has advanced an awful lot since 1890. And I feel that somewhere a Court has got to hear the evidence of what the state of the art is now on the effect of electricity on the human body during the course of execution by electrocution in Virginia.

Also, I really came to this conclusion when it kind of dawned upon me, and I don't profess to be a constitutional scholar, but why have many, I'm sure hundreds of thousands of hours, and Lord knows how many pieces of paper have been spent on trying to define the circumstances under which the death penalty can be imposed. And just look at the number of cases on that that have gotten to the U.S. Supreme Court. And we talk about very minute, little things, down to even questions that you ask the

jurors on determining whether or not the death penalty could be imposed, and it seems like you just draw a line. If everything is constitutionally permissible up to the time that the death penalty is imposed, you draw a line, and you don't look at how it's done, when all of it is supposed to be based upon the same constitutional provision.

I just think that it's time that some Court somewhere, if it's not me, it will probably be somebody else, so why not let it be me, and let me make this decision, and this evidence should be heard.

Now, having said that, and just so it's on the record somewhere, so somebody who is reviewing this somewhere down the road doesn't wonder sometime why I did what I did, let's go forward and deal with

what we have to deal with here this afternoon.

* * * * *

C E R T I F I C A T E

STATE OF VIRGINIA:

COUNTY OF LOUDOUN:

I, Deborah Schmid Weathersbee, Notary Public for the State of Virginia At Large, do hereby certify that I reported the foregoing by stenographic and mechanical mean, which matter was held on the date, and at the time and place set out on the title page hereof; and that the foregoing constitutes a true and accurate transcript of same.

I further certify that I am not related to any of the parties, nor am I an employee of or related to any of the attorneys representing the parties, and I have no financial interest in the outcome of this matter.

GIVEN under my hand and seal this 12th day of February, 1993.

My Commission Expires:

February 28, 1995

/s/ Deborah S. Weathersbee
Notary Public

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

MAR 17 '93 10:11 HHP DIVISION

No. 92-7944
A-698

IN THE SUPREME COURT OF THE UNITED STATES

SYVASKY LAFAYETTE POYNER, et al.,

Petitioners

v.

EDWARD W. MURRAY,
Director, Virginia Department of Corrections, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit and
Motion for Stay of Execution

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND OPPOSITION TO MOTION FOR STAY OF EXECUTION

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MAR 17 '93 10:11 AM DIVISION

No. 92-[illegible]
A-698

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IN THE SUPREME COURT OF THE UNITED STATES

SYVASKY LAFAYETTE POYNER, et al.,

Petitioners

v.

EDWARD W. MURRAY,
Director, Virginia Department of Corrections, et al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit and Motion for Stay of Execution

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND OPPOSITION TO MOTION FOR STAY OF EXECUTION

CERTIFICATE OF SERVICE

I, Katherine B. Toone, a member of the Bar of this Court, certify pursuant to Rule 29.5(b) that copies of the Respondents' Brief in Opposition to Petition for Writ of Certiorari and Opposition to Motion for Stay of Execution and of the Respondents' Appendix were hand-delivered to Alexander H. Slaughter, Esquire, McGuire, Woods, Battle & Boothe, One James Center, 901 East Cary Street, Richmond, VA 23219, on March 17, 1993.

Katherine B. Toone
Assistant Attorney General

MAR 17 '93 10:11 AM DIVISION

QUESTIONS PRESENTED

[illegible] Court's authority of execution [illegible] prisoner who murdered five women in a span of eleven days, and who long ago exhausted his federal habeas corpus remedies, just because he has asked the Court to review a minor point of federal appellate practice unrelated to the validity of his state court convictions or five death sentences?

2. Should this Court grant certiorari in a § 1983 action to review the petitioner's claim that electrocution is unconstitutional when the claim is barred by default and was dismissed as frivolous by the Court of Appeals?

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PRELIMINARY STATEMENT

On June 9, 1993, the United States Court of Appeals for the Fourth Circuit entered an order that the district court had entered in Syvasky Poyner's class action suit brought under 42 U.S.C. § 1983. This was the second time in Poyner's case that the Fourth Circuit had been required to reverse an order by the same district court that would have interfered with the execution of a different Virginia prisoner in the name of assisting Poyner's lawsuit. The Fourth Circuit, after examining the record in the case, also directed the district court to dismiss the § 1983 suit with prejudice because it was "entirely without merit." (Pet. App. 69). Poyner petitioned the Court of Appeals for a rehearing en banc on February 2, 1993, but not one judge believed the case even warranted a poll of the full court. The petition therefore was denied on February 17, 1993. (Pet. App. 79). This is the fourth time Poyner has petitioned for certiorari, and he asks for a stay of his execution scheduled for March 18, 1993.

STATEMENT OF THE CASE

1. The Crimes

On January 24, 1984, Poyner entered a hair salon in Hampton, Virginia he had picked at random and, at gunpoint, ordered Joyce Baldwin, the sole employee, to give him her money. Baldwin cried and begged Poyner not to kill her, but he forced her to the back of the store, took her money and then shot her, execution-style, in the back of the head. Poyner v. Commonwealth, 229 Va. 401, 425-426, 329 S.E.2d 815, 832 (1985).

Six days later, Poyner stole a car, drove to nearby Williamsburg and entered a motel that he had picked at random. He then ordered Clara Paulette at gunpoint to give him her money. As she handed over $40 in cash, Chestine Brooks happened to walk in. Poyner ordered Ms. Paulette and Ms. Brooks to turn their backs to him and to face a counter. Even though they followed his orders, Poyner shot both women, execution-style, in the back of the head. Id. at 416, 329 S.E.2d at 826-827.

The next day, Poyner drove past an ice cream parlor in Newport News, Virginia, saw a lone [illegible] "jumped," but handed Poyner about $30 in cash. Ms. Ripple "crouched in a corner in terror" as Poyner shot her in the head. Id. at 421-422, 329 S.E.2d at 836.

Two days later, Poyner abducted Carolyn Hedrick from a Hampton street at gunpoint, forced her into her own car and, while she cried and begged for her life, made her undress, raped her, shot her in the head and dumped her nude body onto a church parking lot. Poyner then drove around in Ms. Hedrick's car selling candy he had found on the back seat. Id. at 426-427, 329 S.E.2d at 833.

When Poyner was arrested two days later, he fully confessed to the crimes. The United States Magistrate Judge who viewed the videotaped confession during Poyner's federal habeas corpus proceeding concluded that "[t]he Court finds that the videotape portrayed petitioner accurately as a cold-blooded murderer." (Resp. App. 2). When the police asked him why he had picked these victims, Poyner explained that women are afraid of guns and are therefore easier to rob than men and that he was following the advice of fellow inmates from past incarcerations who had said they wished they had eliminated their eyewitness-victims. Poyner v. Murray, 964 F.2d 1404, 1408 (4th Cir. 1992). The murder weapon was subsequently found under Poyner's bed. Id.

2. *Poyner's Trials*

Poyner was first convicted in the Circuit Court of the City of Williamsburg and James City County for the capital murders of Chestine Brooks and Clara Paulette during a robbery. In a second trial, he was convicted in the Circuit Court of the City of Hampton for the capital murder of Joyce Baldwin during a robbery and for the capital murder of Carolyn Hedrick during a separate robbery. In a third trial, he was convicted in the Circuit Court of the City of Newport News for the capital murder of Vickie Ripple during a robbery.

Poyner was sentenced to death for each murder based upon a finding in each separate sentencing [illegible] future acts [illegible]. The Hampton murders of Joyce Baldwin and Carolyn Hedrick also were found to be outrageously or wantonly vile, horrible or inhuman in that they involved depravity of mind and torture. Poyner v. Commonwealth, 229 Va. at 422, 424-429, 433, 329 S.E.2d at 830, 832-833, 835.

3. *Direct Appeal*

In a consolidated, automatic appeal, the Virginia Supreme Court affirmed the convictions and death sentences. Poyner v. Commonwealth. This Court denied the three petitions for a writ of certiorari in Poyner v. Virginia, 474 U.S. 865 (1985) (Newport News and Williamsburg), and Poyner v. Virginia, 474 U.S. 888 (1985) (Hampton).

4. *State Habeas*

Poyner's state habeas corpus petitions filed in the three state circuit courts were dismissed by those courts in May of 1987 after extensive briefing and oral argument. The Virginia Supreme Court refused his three petitions for appeal from those judgments in April of 1988. This Court again refused to hear Poyner's case when it denied his three petitions for certiorari to the Virginia Supreme Court's habeas corpus judgment. Poyner v. Barr, 488 U.S. 871 (1988).

5. *Federal Habeas*

Poyner then filed three petitions pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia. The petitions were referred to the United States Magistrate Judge who, after considering the extensive record and pleadings, recommended their dismissal in October of 1989. The district court conducted a de novo review of the Magistrate Judge's report and entered final judgment, dismissing the petitions on December 21, 1990. Poyner's subsequent motion to reconsider was denied by the distr. court on February 15, 1991. On appeal, the Fourth Circuit unanimously upheld the judgments denying federal habeas relief in an opinion that consolidated the three cases. Poyner

Murray, and this Court denied Poyner's third petition for a writ of certiorari on November 2, 1992.

6. The § 1983 Case

Having exhausted all avenues of direct and collateral review of his convictions and sentences, Poyner embarked upon a new tack. On December 10, 1992, he filed a class-action lawsuit in the United States District Court in Richmond pursuant to 42 U.S.C. § 1983 purportedly on behalf of all present and future Virginia capital murderers, alleging that execution in Virginia's electric chair constitutes cruel and unusual punishment because death by electrocution supposedly is painful and not instantaneous.[1] Poyner filed his § 1983 action at approximately 4:00 p.m., just seven hours before a fellow death row inmate was scheduled to be executed. Poyner obtained permission from the district court to appear at 5:00 p.m. to request the court to order the respondents to permit him to videotape the pending execution and participate in the subsequent autopsy.

After orally certifying the class, the district court announced its decision from the bench at 7:15 p.m., which was expressly to mandatorily enjoin the Commonwealth to permit the videotaping of the execution of Timothy Bunch, the Virginia death-row inmate scheduled for execution at 11:00 that night. The district court also enjoined the Virginia Department of Corrections to execute Bunch without the execution mask that is a necessary part of the established procedure in Virginia and directed that Poyner's

[1]Neither the allegations nor "facts" asserted in Poyner's lawsuit were in any sense new. To the contrary, in January of 1992, Herbert Bassette, a Virginia death row inmate represented by one of the same firms who represents Poyner, filed an almost identical § 1983 action in the same federal district court based on affidavits from many of the same experts Poyner relies on. (Resp. App. 81). The district court granted Bassette an evidentiary hearing on his claims, but his lawyers abruptly withdrew the suit with prejudice the night before the hearing, with the only condition being the Commonwealth's agreement not to seek fees against them. (Resp. App. 87). Poyner repeatedly asserts that the Commonwealth has only recently adopted a "two jolt" method of electrocution. (Stay Motion at 9). This simply is untrue: except for two executions during the summer of 1991, the policy of the Department of Corrections is now and always has been to administer "two jolts" of electricity during an execution; indeed, Poyner's own affidavit submitted to the Governor (but not to this Court), shows that the Commonwealth's policy was to administer two jolts of electricity when Frank Coppola was executed in 1982. (Resp. App. 88).

"expert" be permitted to observe Bunch's autopsy. (Resp. App. 4-5). The Commonwealth immediately appealed the district court's order and moved the district court to stay the injunction pending appeal. The district court denied the motion, and the Commonwealth sought a stay of the injunction ordered by the district court and, on the night of December 10, the Court of Appeals stayed the district court's order. (Resp. App. 6-7). Although Bunch, a member of the class, sought stays of his execution in his own habeas proceeding on the basis that Poyner's § 1983 suit was pending, the Commonwealth argued that Gomez v. U.S. District Court, 112 S.Ct. 1652 (1992), precluded the granting of a stay under such circumstances. This Court agreed and denied Bunch's request for a stay of execution. Bunch v. Wright, 113 S.Ct. ___ (Dec. 10, 1992). Despite the fact that Poyner held himself out as the representative of the class, he never sought a stay on behalf of his fellow class member Bunch.[2]

On January 19, 1993, again at Poyner's request, the same district court granted a second injunction that ordered the Commonwealth to allow Poyner's "expert" to participate in the autopsy to be performed on Charles Stamper after his execution scheduled that night.[3] (Pet. App. 56). Upon the Commonwealth's appeal from the injunction, the Court of Appeals again reversed the district court, this time ordering the § 1983 action dismissed with prejudice. (Pet. App. 69). Poyner's petition for rehearing en banc was denied on February 17, 1993. (Pet. App. 79).

7. Execution Date Set

Immediately after this Court denied Poyner's last certiorari petition on November 2, 1992, the Circuit Court of the City of Williamsburg and James City County notified Poyner's lawyers that it intended to set a date of execution and directed them to advise the court of their earliest available dates

[2]Incredibly, Poyner's recitation of the historical facts of his case fails to even mention the actions which both he and the district court took in an attempt to interfere with the Bunch execution.

[3]Poyner sought a stay of Stamper's execution but the Commonwealth argued that Gomez precluded the granting of such a stay. The district court, the Fourth Circuit, and this Court agreed. See Stamper v. Wright, 113 S.Ct. ___ (Jan. 19, 1993).

for a court appearance. (Resp. App. 71). When Poyner's lawyers had not responded by December 8, [illegible] court's request by December 21, 1992. (Resp. App. 72). Poyner's lawyers, however, first filed their § 1983 lawsuit on December 10 and did not comply with the circuit court's request for available dates until December 16, 1992. (Resp. App. 74). On December 21, 1992, Poyner was notified that a hearing date had been set. (Resp. App. 74).

On January 21, 1993, the circuit court held a hearing at which Poyner's lawyers were present (Poyner himself waived any right to be present) and set the date of Poyner's execution for March 18, 1993. (Resp. App. 9). During that proceeding, which was neither a criminal nor a habeas corpus proceeding but rather a statutorily-required mechanism for setting an execution date (see Va. Code § 53.1-232), Poyner unsuccessfully asked the circuit court to postpone the setting of an execution date. Poyner then unsuccessfully asked the court to hold an evidentiary hearing on his electric chair claim before setting a date. On February 25, 1993, Poyner petitioned the Supreme Court of Virginia for an appeal from the order setting an execution date on the ground that he was denied a hearing on his claim. (Resp. App. 17). The Supreme Court of Virginia, however, refused the appeal on March 10, 1993, finding "no merit in [Poyner's] claim that the court below erred in refusing to conduct an evidentiary hearing regarding the constitutionality of Virginia's present method of executing prisoners." (Resp. App. 47).

8. *Present Request For Stay*

In connection with this most recent of his four certiorari applications, Poyner filed a motion for a stay of his execution with the Fourth Circuit on March 12, 1993 -- three months after he initiated his § 1983 action, almost two months after it was dismissed and less than a week before his scheduled execution. (Resp. App. 49). The Fourth Circuit denied the stay on March 13, 1993, finding as follows:

> Substantially all of the facts on which Poyner now relies have been public knowledge and easily available to him at least since the dissenting

> opinion of Justice Brennan in Glass v. Louisiana, 471 U.S. 1080 (April 29, 1985) which in turn relied upon some public [illegible] should have been raised by Poyner in his state and federal habeas petitions...but was not raised until the current Section 1983 case was filed on December 10, 1992.

(Resp. App. 58).

9. *Request for Executive Reprieve*

On March 11, 1993, Poyner filed a petition with the Governor of Virginia in which he sought a reprieve until he could either find a court that would grant him an evidentiary hearing on his claims about the electric chair or until the Governor heard the evidence. The Governor denied the reprieve on March 16, 1993, finding that electrocution was not cruel and unusual punishment and noting that if he believed Poyner's claims he would not have allowed the executions of the ten prisoners whose death sentences had been carried out during his tenure in office. (Resp. App. 90).

POYNER'S PETITION AND MOTION FOR STAY OF EXECUTION SHOULD BE DENIED

There are several reasons, taken together or separately, why Poyner's petition for a writ of certiorari and request for a stay of execution should be denied:

Summary Of Argument

Syvasky L. Poyner, like Robert Alton Harris last year, seeks to use a contrived § 1983 complaint as a basis for obtaining a last-minute stay of his execution. The reasons this Court rejected Harris' transparent attempt to thwart justice apply with even more force here. See Gomez v. U.S. District Court; Vasquez v. Harris, 112 S.Ct. 1713 (1992).

From its inception, the § 1983 class action suit instigated by Poyner has been characterized and driven by two essential [illegible]

Amendment's prohibition against cruel and unusual punishment as it relates to judicially approved

about Poyner's argument is its failure to recognize that a punishment must be both cruel and unusual to violate the Eighth Amendment and that no constitutional requirement that executions be instantaneous exists or has ever existed.

Put simply, Poyner's argument is grounded upon his lawyers' subjective disapproval of execution by electrocution, rather than on what is prohibited by the Eighth Amendment. And, despite what Poyner says he understands, this Court's decision in In Re Kemmler, 136 U.S. 436 (1890), is just the starting point of an Eighth Amendment analysis of execution by electrocution, not its end.

Poyner would have this Court believe that the Court of Appeals did not understand he was attacking the specific use of Virginia's electric chair as well as all executions by electrocution. Ironically, however, what the Court of Appeals recognized, but Poyner refuses to accept, is the simple fact that his two "separate" arguments are indistinguishable in the constitutional sense, regardless of how he characterizes them. This is because what he claims makes executions in Virginia's electric chair unconstitutional is no different from what the courts have long recognized happens during every execution by electrocution. The following statement by a federal district judge in Florida thus applies equally to Poyner's argument: "A federal court is particularly ill-suited to fill the role of the office of master electrician for the electrocution chamber....This is, however, the role in which petitioner would cast the Court." Hamblen v. Dugger, 748 F. Supp. 1498, 1504 (M.D. Fla. 1990).

In sum, as the Fourth Circuit just held on March 13 in denying Poyner's stay request, not only could the petitioner have raised the essential facts he now relies on during his prior habeas proceedings, his unproven claims "even if true are based on no factual premise which would show that the method of Poyner's execution would involve 'cruelty inherent in the method of punishment, not the necessary

suffering involved in any method employed to extinguish life humanely.' Louisiana ex rel. Francis L.

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I

POYNER IS NOT ENTITLED TO A STAY

The Court of Appeals' judgment in the federal § 1983 case that Poyner wants this Court to review cannot adversely affect the judgment of the state court that sentenced him to death or the order of the state court that directed the Virginia Department of Corrections to carry out his sentence on March 18, 1993. Under Rule 23 of the Rules of this Court and 28 U.S.C. § 2101(f), Poyner can seek a stay only of the judgment below, but in this case the "judgment below" did not pertain directly to Poyner's criminal conviction or sentence. The judgment below dealt only with a class-action § 1983 lawsuit. Therefore, even if an appropriate application to stay the enforcement of the judgment below was granted now, that stay could not stop Poyner's execution; it could result only in putting Poyner's § 1983 suit on hold while this Court decided the issues presented in the certiorari petition, i.e., procedural issues pertaining to federal appellate practice which are unrelated to the legality of Poyner's convictions and five death sentences. Indeed, when Poyner appeared before the Virginia Supreme Court on March 8, 1993, to argue orally his petition for appeal from the order setting his execution date, he expressly conceded that he had been properly convicted of his crimes and had no complaint about the validity of his death sentences. A stay of Poyner's execution simply is not authorized in connection with this or any other § 1983 proceeding.

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[4]Poyner's reliance on the fact that the Fourth Circuit referred to his claims as "unproven" not only ignores the fact that the Court of Appeals rejected the claims as inadequate "even if true," but also the that fact his own "pain" expert, Dr. Price, believes that the issue of consciousness during execution is incapable of proof. (Pet. Stay Exh. 13, ¶ 10); see Hamblen v. Dugger, 748 F. Supp. at 1503 (testimony from petitioner's "pain" expert about electric chair characterized as speculation not susceptible to proof in court).

Even if a motion for stay of execution were cognizable, however, Poyner cannot meet the [illegible] state [illegible] interest in preventing abuses of the judicial system designed merely to delay. See Barefoot v. Estelle, 463 U.S. 880, 895 (1983). When a motion for a stay accompanies a second or successive petition, "[t]he granting of a stay should reflect the presence of substantial grounds upon which relief might be granted." Id. If the successive petition is barred under 28 U.S.C. § 2244(b) and Rule 9, Rules Governing Section 2254 Cases, the "substantial grounds' required for a stay do not exist. Delo v. Stokes, 110 S.Ct. 1880, 1881 (1990). See also Sullivan v. Wainwright, 464 U.S. 109, 110-111 (1983) (stay denied where prisoner raised claims that had been "presented several times previously in both state and federal courts and [and] been found to be meritless").

When this standard is applied to Poyner's stay motion, it is clear that it must be denied. Poyner expressly asked the district court to "enjoin the defendants from using electrocution as a method of carrying out death sentences," i.e., he wanted the court to issue, in the guise of a civil injunction, a stay of execution for every member of the class until Virginia adopted a method of execution that suited the district court. As has been obvious from the outset, however, the only execution Poyner is truly interested in staying is his own. But this Court has made clear that a death-row inmate cannot use a § 1983 action as a device to avoid the procedural bars applicable to successive habeas corpus petitions or to obtain a stay to which he otherwise is not entitled.

In Gomez v. U. S. District Court, the lower federal courts had granted California death-row inmate Robert Alton Harris a last-minute stay of execution because he was a member of the class in a § 1983 action filed by fellow death-row inmate Gomez claiming that California's procedure for execution by lethal gas was cruel and unusual in violation of the Eighth Amendment. This Court, however, summarily vacated Harris' stay:

> This case is an obvious attempt to avoid the application of McCleskey v. Zant...to bar this successive claim for relief. Harris has now filed four [illegible] cause for his failure to raise this claim in his prior petitions.

112 S.Ct. at 1653 (citation omitted).

Then, to underscore this ruling, this Court subsequently entered an extraordinary order that "[n]o further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court." Vasquez v. Harris, 112 S.Ct. 1713 (1992). Poyner's strategy is identical to that of Harris and Gomez: by calling his case a § 1983 action, he obviously is attempting to avoid the procedural bars which would preclude habeas corpus relief. But, as the Fourth Circuit concluded on March 13 when it rejected Poyner's last-minute request for a stay, this ploy has no more validity here than it had in Gomez. (Resp. App. 59).

Gomez makes clear that, even if a complaint technically is cognizable as a § 1983 action, an artifice of pleading cannot save the plaintiff from the consequences of his abuse of the judicial system. Poyner's thinly disguised attempt to stay his execution with a claim he deliberately abandoned in a prior unsuccessful collateral proceeding clearly is prohibited from federal court review.[5] Moreover, there are even stronger reasons in Poyner's case to deny a stay than there were in Gomez. The stay in Gomez at least was based upon a pending lawsuit where no determination of the issue had been made, yet this Court still refused to hear Harris' complaint. Poyner's request, on the other hand, lacks even the superficial

[5] In his direct appeal to the Supreme Court of Virginia, Poyner unsuccessfully claimed that execution by electrocution constituted cruel and unusual punishment. See Poyner v. Commonwealth, 229 Va. at 406, 329 S.E.2d at 820-821. He later abandoned this claim, however, by failing to raise it in his first federal habeas corpus petition. And, as the Fourth Circuit has found, the factual bases for Poyner's claim clearly were available when he litigated his state and federal habeas proceedings. (Resp. App. 58). The claim, therefore, is barred by Poyner's abuse of the writ. See Kuhlmann v. Wilson, 477 U.S. 436, 444 n. 6 (1986). This is true even though Poyner relies on subsequent occurrences as "evidence" to support the claim. See McCleskey v. Zant, 111 S.Ct. 1454, 1472-74 (1991); see also Jones v. Whitley, 938 F.2d 536, 542 (5th Cir. 1991) (recent alleged malfunctions of Louisiana electric chair "do not show that it is...any more inhumane than it ever was when previous constitutional challenges were rejected"). Poyner cannot show cause for such a default, and without a showing of actual innocence -- impossible here -- the claim simply is not cognizable. See McCleskey, 111 S.Ct. at 1470.

appeal that the Ninth Circuit apparently found in Gomez. The Fourth Circuit ordered Poyner's "cruel

than seven decisions from this Court have recognized that execution by electrocution is constitutional. Indeed, the Court of Appeals pointed out that "there is no contrary decision." (Pet. App. 76).

This determination that Poyner's § 1983 case is utterly frivolous makes his request for a stay of execution untenable. Further, his lengthy history of litigation coupled with his final, eleventh-hour resort to the subterfuge of a § 1983 action brought solely for the purpose of delay, disentitles him to consideration now. Poyner's effort to coerce a stay out of such an abuse of the legal process must meet the same fate as Robert Alton Harris' equally transparent effort in Gomez.*

II

POYNER HAS ADVANCED NO REASON WARRANTING REVIEW OF THE COURT OF APPEALS' CASE-SPECIFIC DETERMINATION THAT HE COULD NOT POSSIBLY SUCCEED ON THE MERITS OF HIS CLAIM

Poyner would have this Court believe that the district court's repeated attempts to interfere with the executions of other Virginia prisoners at his request were nothing more than mere "discovery" orders entered in the context of Poyner's § 1983 class action. This Court should not be fooled by Poyner's disingenuous argument.

Although Poyner's petition inexplicably fails to even mention the facts of his first attempt to interfere with a Virginia execution, it is important for this Court to understand what the record shows:

*Poyner's attempt to distinguish his case from Gomez must fail. While it is true that Poyner filed his § 1983 suit in December, 1992, he did so only after the trial court had notified him that it intended to set an execution date in the near future. (Resp. App. 71). Poyner then attempted to use the pendency of his federal suit to forestall the state court from setting an execution date. (Resp. App. 75). Thus, just like Harris did in Gomez, Poyner has tried to thwart his execution with a lawsuit that even by his own admission could have been filed years ago. And, regardless of when Poyner filed his § 1983 suit, the fact remains that just like virtually every other death row inmate facing imminent execution, Poyner has waited until the last minute to come to this Court seeking a stay.

on December 10, 1992, when Poyner asked the district court to order the Commonwealth of Virginia to

subsequent autopsy, the district court clearly understood Poyner to be asking for an injunction, not merely discovery. Before the district court read its order from the bench, the court stated that the order "just spells out what is requested," and, both the court's statement from the bench and the order it subsequently entered expressly directed that the Commonwealth was "mandatorily enjoined" to allow the district court's own court reporter to supervise the videotaping of Bunch's execution under conditions dictated by the court. The injunction included a specific directive that Bunch's face must be left uncovered by the mask that is an integral part of the electric chair's headpiece. (Resp. App. 4, 61). Significantly, in the same order granting Poyner's requested injunction, the court directed the Commonwealth to allow Poyner to "have one representative present to observe" Bunch's autopsy. (Resp. App. 5).

Neither before nor after the district court entered its injunction order with respect to Bunch's execution did Poyner dispute the court's characterization of his request as one for an injunction or object to the court's granting of injunctive relief. The record thus demonstrates beyond dispute that both the district court and Poyner viewed the court's December 10 order as an injunction.

When the Commonwealth appealed that injunction to the Fourth Circuit and sought a writ of prohibition, moreover, the Court of Appeals recognized the order for what it was and promptly vacated it. (Resp. App. 6). Poyner made no attempt to seek review in this Court, but when the next Virginia death row inmate was scheduled for execution, Poyner went right back to the same district judge and again asked for permission to videotape the execution and to participate in the subsequent autopsy. In addition, he asked the judge this time to order the Commonwealth to hand over to his expert the condemned man's brain. (Resp. App. 63-68). Having experienced first-hand the power of the Court of Appeals to vacate injunctions, however, Poyner and the district judge were careful to couch Poyner's second request as a discovery motion rather than a request for an injunction. The court [illegible]

on this "discovery motion" at 4:00 p.m., January 15. Then, at about 3:00 p.m. on January 19, 1993, [illegible] designated pathologist to participate in Stamper's autopsy. (Pet. App. 56).

The relief granted by the district court on January 19, at least with respect to the autopsy, thus was far more intrusive than the injunction the court had granted on December 10 because the December 10 injunction merely required the Commonwealth to permit Poyner's representative to observe Bunch's autopsy. The January 19 order, on the other hand, required the Commonwealth to allow Poyner's pathologist to take possession of pieces of Stamper's brain in order to perform experiments in England deemed necessary by Poyner to prosecute his § 1983 action. (Pet. App. 56). The district court ordered this relief, moreover, even though it would have been a violation of Virginia law for Poyner's "expert" to participate in the autopsy. See Va. Code § 32.1-285. Furthermore, the order was entered despite the fact that the court knew Stamper himself had refused to consent to this procedure.

When the Commonwealth again appealed, the Fourth Circuit was not taken in by Poyner's effort to camouflage the district court's injunction. Surely, if Poyner, the district court, and the Fourth Circuit understood the district court's December 10 order to be an injunction requiring the Commonwealth to permit Poyner's representative to observe an autopsy, the true character of the January 19 order granting even more intrusive procedures was not altered merely by the decision of Poyner and the district court to label it as a "discovery" order. See Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 287-288 (1988); Carlson v. American Brands, Inc., 450 U.S. 79, 83-84 (1981) (practical effect of order governs characterization as injunction).

There can be no doubt, then, that when the Fourth Circuit entered its order on January 19 directing the district court to dismiss Poyner's underlying class action as frivolous, the Court of Appeals was dealing with an extremely intrusive situation which apparently was going to be repeated with every scheduled Virginia execution. All of this occurred, moreover, [illegible]

Commonwealth had filed a dispositive motion to dismiss Poyner's class action which the district court [illegible] authority (perhaps the obligation), not only to vacate the district court's injunction, but also to order the district court to dismiss the underlying, frivolous lawsuit. See Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940) (appellate court may dismiss action if obstacles to success on merits are "insuperable").[7]

The issue of whether in a given case there are "insuperable" impediments to the success of a lawsuit is necessarily a case-specific inquiry. In Poyner's case, because of the exigencies involved in the impending executions of Timothy Bunch and Charles Stamper, the Fourth Circuit closely monitored the pleadings and developments in Poyner's class action from the time the suit was filed on December 10 until January 19 when the Court ordered it dismissed. The Court concluded that in view of all the facts, even the facts as alleged by Poyner, he could not possibly succeed on his claim that Virginia's method of execution by electrocution violates the Eighth Amendment and that allowing the lawsuit to continue would only further strain the interest of federal-state comity which the orders appealed from had so severely tested. Indeed, in its March 13 order denying Poyner's motion for a stay, the Fourth Circuit expressly stated that, even if true, Poyner's complaint could not show an Eighth Amendment violation. (Resp. App. 59).

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[7] The circuit courts of appeals have uniformly followed this same procedure in similar circumstances. Lee v. Ply*Gem Industries, Inc., 593 F.2d 1266, 1268 (D.C. Cir. 1979); Avery v. Secretary of Health and Human Resources, 762 F.2d 158, 161 (1st Cir. 1985); Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67, 70 (2nd Cir.), cert. denied, 385 U.S. 971 (1966); Kershner v. Mazurkiewicz, 670 F.2d 440, 447-448 (3rd Cir. 1982); Allstate Insurance Co. v. McNeill, 382 F.2d 84, 88 (4th Cir. 1967); Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086, 1091 (5th Cir. 1973); Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1370 (6th Cir. 1977); Libertarian Party of Indiana v. Packard, 741 F.2d 981, 990-991 (7th Cir. 1984); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 73-74 (8th Cir. 1976); Lopez v. Heckler, 725 F.2d 1489, 1497 (9th Cir. 1984); Callaway v. Block, 763 F.2d 1283, 1287-1288 n.6 (11th Cir. 1985); Cordis Corp. v. Medtronic, 780 F.2d 991, 993-994 (Fed. Cir. 1985). As the Fifth Circuit has aptly noted, "[o]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." See Mercury Motor Express, Inc., 475 F.2d at 1091.

This Court should defer to the Court of Appeals' resolution of this fact-bound inquiry. After all, [illegible] v. Johnston, 268 U.S. 220, 227 (1925). See also Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J., respecting the denial of certiorari).

III

CERTIORARI SHOULD NOT BE GRANTED BECAUSE POYNER CANNOT PREVAIL EVEN IF THE COURT OF APPEALS WERE REVERSED

As discussed above, the Court of Appeals dismissed Poyner's "cruel and unusual" claim because the "exact question" had been decided adversely to Poyner by every court to consider it. The court's conclusion that "the basic premise in the underlying case in the district court is entirely without merit" was undeniably correct and renders Poyner's certiorari issues completely meaningless.[8]

This Court first held in In Re Kemmler that death by electrocution is not unconstitutional, and has never deviated from that holding. In Louisiana v. Resweber, 329 U.S. 459 (1947), for example, this Court held that the electrocution of a prisoner, after the first attempt to execute him had failed because of a mechanical defect in the electric chair, did not constitute cruel and unusual punishment. And, Justice Brennan, dissenting from the denial of certiorari in Glass v. Louisiana, 471 U.S. 1080 (1985), acknowledged that a "single, unforeseeable accident in carrying out an execution does not establish that the method of execution itself is unconstitutional." Id. at 1085; accord, Estelle v. Gamble, 429 U.S. 97,

[8]An additional reason why certiorari must be denied is that Poyner's underlying § 1983 claim is barred from federal review by the "new rule" doctrine that requires rejection of a claim made in a collateral attack upon a state court proceeding unless it was compelled by precedent existing at the time the state judgment became final. See Graham v. Collins, ___ U.S. ___, 61 U.S.L.W. 4127, 4129 (Jan. 25, 1993). Poyner's petition openly seeks a new rule by expressly asking this Court to overrule its precedents holding electrocution to be constitutional, and no precedent supports, must less compels, the rule he seeks. In view of this insurmountable obstacle to collateral relief, certiorari review would be entirely inappropriate. And, allowing a death row prisoner to obtain § 1983 relief on a claim clearly barred under the "new rule" doctrine would have a devastating impact on the interests the doctrine is designed to protect.

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105 (1976) ("[a]n accident [during an execution], although it may produce added anguish, is not on that [illegible] courts have held without exception that execution by electrocution is constitutional.[9] The Virginia Supreme Court likewise consistently has rejected claims that death by electrocution constitutes cruel and unusual punishment.[10]

Not only is the law uniform with respect to the constitutionality of electrocution in theory, but also in practice. Electrocution is hardly an "unusual" punishment, having been the sole mode of execution in Virginia and other States for almost a century. See Walton v. Arizona, 497 U.S. 639, ___, 111 S.Ct. 511, 539 (1990) (Scalia, J., concurring) (the Eighth "Amendment ... requires a court to consider not only whether the penalty is severe or harsh, but also whether it is 'unusual.' If it is not, then the Eighth Amendment does not prohibit it, no matter how cruel a judge might think it to be."). This Court, moreover, has made clear that any claim challenging a punishment as presently "contrary to evolving standards of decency" must be analyzed not by reference to the personal inclination of judges, or even by reference to "state of the art" technology in executions, but with the deference owed to the decisions of state legislatures under our federal system. Stanford v. Kentucky, 492 U.S. 361, 369-370 (1989); see also McCleskey v. Kemp, 481 U.S. 279, 300 (1987), quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976) ("legislative judgment [about criminal sanctions] weighs heavily in ascertaining contemporary standards"). It is not surprising that Poyner ignores the "unusual" component of the Eighth Amendment because the present wide acceptance of electrocution by the States not only disproves any

[9]See, e.g., Jones v. Whitley, 938 F.2d 536 (5th Cir. 1991); Lowenfield v. Phelps, 817 F.2d 285 (5th Cir. 1987), aff'g, 671 F.Supp. 423 (E.D. La. 1987); Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987); Lindsey v. Smith, 820 F.2d 1137 (11th Cir. 1987); Funchess v. Wainwright, 788 F.2d 1443 (11th Cir. 1986); Johnson v. Kemp, 759 F.2d 1503 (11th Cir. 1985).

[10]Stockton v. Commonwealth, 241 Va. 192, 402 S.E.2d 196, cert. denied, 112 S.Ct. 280 (1991); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980); Hall v. Commonwealth, 131 Va. 777, 109 S.E. 582 (1921).

claim that electrocution is an "unusual" punishment in the constitutional sense, but also destroys any claim

prove national consensus in his favor).

Notably, Poyner's argument that the Court of Appeals' decision would exempt from constitutional review an execution by "car batteries" only highlights his fundamental misunderstanding of the Eighth Amendment. (Ptn. at 32). Electrocution by "car batteries" would be "unusual" and therefore satisfy one of the prongs of an Eighth Amendment claim. It is precisely because the electric chair has for over a century been the "usual" method (indeed the only method) of carrying out judicial electrocutions in States that provide for electrocution, however, that Poyner's "car battery" hypothetical is so spurious. His exaggerated reaction to the Court of Appeals' decision only emphasizes the weakness of his argument.

Poyner's circular argument, moreover, also demonstrates its lack of merit. Poyner complains that the particular method of electrocution used in Virginia, as distinguished from electrocution in general, is unconstitutional. In reality, however, the "facts" alleged by Poyner about electrocution in Virginia are no different from the "facts" he alleges with respect to electrocutions in general; indeed, they are no different from the facts of electrocutions in other States which have been considered by the courts and which without exception have been found inadequate to establish "cruel and unusual punishment" as defined under Eighth Amendment jurisprudence.[12]

In the final analysis, whether Poyner couches his claim as one attacking execution by electrocution in general or executions in Virginia's electric chair alone, the result is the same. In his stay

[11]According to the United States Department of Justice bulletin, "Capital Punishment 1991," 12 of the 36 States with capital punishment authorize electrocution as the method of execution, making it the second most commonly used method. (Resp. App. 70).

[12]See, e.g., Squires v. Dugger, 794 F. Supp. 1568 (M.D. Fla. 1992); Thomas v. Jones, 742 F. Supp. 598 (S.D. Ala. 1990); Ritter v. Smith, 568 F. Supp. 1499 (S.D. Ala. 1983), aff'd, 726 F.2d 1505 (11th Cir. 1984); Hamblen v. Dugger, 748 F. Supp. at 1503 (prisoner's attempt to distinguish his claim that Florida's electric chair was unconstitutional from a per se claim of unconstitutionality was rejected, and the testimony of his "pain" expert was characterized as "speculation" not susceptible to proof).

request to the Fourth Circuit, Poyner admitted that the most that his supposed evidence shows is that "it

neither instantaneously killed nor rendered instantaneously 'unconscious' by the electric current applied to his body." (Resp. App. 52). The Constitution, however, does not require an execution that causes instantaneous death; the Constitution only requires that the State refrain from the unnecessary and wanton infliction of pain, which Poyner did not allege below, much less show. See Resweber, 329 U.S. at 464; Wilson v. Seiter, 111 S.Ct. 2321, 2324 (1991) (Eighth Amendment requires inquiry into prison official's state of mind); Whitley v. Albers, 475 U.S. 312, 320-321 (1986) (suffering must have been inflicted maliciously and sadistically for the very purpose of causing harm). This, then, is the simple answer to Poyner's entire argument.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari and motion for a stay of execution should be denied.

Respectfully submitted,

EDWARD W. MURRAY, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,

Respondents herein.

By: _____
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EDITOR'S NOTE

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A-698

IN THE

SUPREME COURT OF THE UNITED STATES

SYVASKY LAFAYETTE POYNER, et al.,

Petitioners

v.

EDWARD W. MURRAY,
Director, Virginia Department of Corrections, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit and
Motion for Stay of Execution

RESPONDENTS' APPENDIX

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for Writ of Certiorari and Opposition
to Motion for Stay of Execution

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[redacted]
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

SYVASKY LAFAYETTE POYNER #128051,

Petitioner,

v. CIVIL ACTION NO. 89-204-N

EDWARD W. MURRAY, Director of the Virginia Department of Corrections,

Respondent.

MAGISTRATE'S REPORT AND RECOMMENDATION

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is a prisoner in the Virginia penal system awaiting execution of a death sentence. The matter was referred to the undersigned United States Magistrate pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 29 of the Rules of the United States District Court for the Eastern District of Virginia.

A. STATEMENT OF THE CASE

1. Background

Petitioner was convicted on June 6, 1984, in the Circuit Court of the City of Williamsburg and County of James City for the capital murder of Clara Louise Paulette and the capital murder of Chestine Brooks. On June 7, 1984, the jury sentenced petitioner to death for each capital murder conviction. On July 18, 1984, the trial court affixed petitioner's sentences of death. Petitioner is currently incarcerated in the Virginia penal system awaiting execution of these death sentences as well as three other death sentences.

The present petition is one of three petitions [illegible] Court will review. All of the petitions [illegible] convictions in three separate trials. Petitioner's trial in Williamsburg was the first of the three trials. The second trial

(4th Cir. 1978); cert. denied, 441 U.S. 911 (1979)." The Court will not judge counsel's effort from hindsight, but rather from the perspective of counsel at the time in question. Id. From the Court's review of the record, it appears that counsel acted competently and adequately. The Court finds no violation of Washington with respect to Grounds 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 23, 25, 26, 27, 28, 30, and 33.

Therefore, these grounds are found to be without merit.

Ground 18

In Ground 18 petitioner alleges that counsel failed to argue that extenuating circumstances existed with respect to the videotaped confession, which demonstrated petitioner's unremorseful, matter-of-fact responses. Petitioner offers as examples of the extenuating circumstances "[s]uch facts as the paternal influence of Detective Spinner, the length of time between arrest and videotaping, the mental capacity of Petitioner, the staged, rehearsed format, and so forth." Petitioner concludes that these circumstances explain petitioner's lack of remorse and matter-of-fact responses.

The Court rejects petitioner's arguments. The Court finds that petitioner has not borne the burden of proving with particularity how counsel's performance was inadequate. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner sets forth conclusory statements, failing to plead the actual prejudice that allegedly resulted from counsel's deficiency.

The Court has viewed petitioner's videotaped confession. The Court finds that petitioner was lucid and articulate at the time of the videotaping. Petitioner spoke of the heinous murders he had recently committed in a methodical fashion and without any expression of remorse whatsoever. The Court finds that the videotape portrayed petitioner accurately as a cold-blooded murderer. Consequently, the Court determines that no extenuating circumstances existed. Thus, counsel had no basis to argue extenuating circumstances and even if they had, it was within their province to select what tactics they would use at trial.

A 498 2

FILED
IN OPEN COURT
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SYVASKY L. POYNER, on behalf of himself and all others similarly situated,	)	
Plaintiffs,	)	CIVIL ACTION NO. 91-CV-815
v.	)	
EDWARD W. MURRAY, Director, Virginia Department of Correction, ELLIS B. WRIGHT, JR., Warden, Greensville Correctional Center, and JOHN DOE, Executioner,	)	
Defendants.	)	

ORDER

WHEREAS plaintiff Syvasky L. Poyner, on behalf of himself and all others similarly situated, by counsel, filed a Complaint against Edward W. Murray, Director of Virginia Department of Corrections, Ellis B. Wright, Jr., Warden, Greensville Correctional Center, and John Doe, Executioner, seeking permanent injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 with respect to the allegedly unconstitutional procedure and means utilized by the defendants and prescribed by the law of the Commonwealth for executing prisoners in Virginia;

AND WHEREAS plaintiff has served on defendants a request to permit entry upon land for purposes of inspecting and videotaping (with audio) the execution of Timothy Bunch, scheduled for Thursday, December 10, 1992 at 11:00 p.m. at the Greensville Correctional Center;

AND WHEREAS plaintiff also has requested that the condemned prisoner's face be visible during the execution;

3

AND WHEREAS plaintiff also has requested that plaintiff's [illegible] be allowed to participate in any autopsy of Timothy Bunch;

AND WHEREAS plaintiff has filed a motion to shorten time for defendants to respond to plaintiff's request to permit entry upon land for inspection and videotaping and requiring defendants to provide plaintiff's representatives access to the Execution Chamber at the Greensville Correctional Center for the purpose of inspecting and videotaping the execution of Timothy Bunch;

HAVING CONSIDERED the arguments contained in plaintiff's motion and memorandum in support thereof, and the oral arguments of counsel for the plaintiff and counsel for the defendants before this Court;

IT IS ADJUDGED AND ORDERED that defendants are manditorily enjoined to permit Gilbert F. Halasz, this Court's reporter, for the purpose of supervising Charles Bradshaw, both of whom shall be permitted entry into the Execution Chamber of the Greensville Correctional Center at 9:00 p.m. on Thursday, December 10, 1992, for the purpose of inspecting and videotaping (with audio) the execution of Timothy Bunch;

AND IT IS FURTHER ADJUDGED AND ORDERED that the execution be performed with the condemned prisoner's face visible during the execution providing same is agreeable to the condemned prisoner, who shall be asked to state his acquiescence or refusal in the presence of the aforementioned Gilbert F. Halasz.

IT IS FURTHER ADJUDGED AND ORDERED that the said Charles Bradshaw, for the purpose of videotaping the execution, be placed

in a position whereby the camera will be able to observe the [illegible] person other than the condemned prisoner. ~~Insofar as possible such taping shall be limited to condemned prisoner's face~~.

Following said execution, the videotape shall be placed in the possession of Gilbert F. Halasz, who shall deliver the same to the Court prior to any viewing of said tape.

IT IS FURTHER ADJUDGED AND ORDERED that plaintiff may have one representative present to observe any autopsy that may be performed on the said Timothy Bunch.

UNITED STATES DISTRICT JUDGE

Date 12-10-92
7:10 p.m.

A TRUE COPY TESTE:
DORIS R. CASEY, CLERK OF COURT
BY: Robert L. Walker, Deputy Clerk

Filed: December 10, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-7229

IN RE ELLIS B. WRIGHT,

Petitioner.

ORDER

In the case of Poyner v. Murray, Civil Action Number 92-CV-815, in the United States District Court for the Eastern District of Virginia at Richmond, the district judge issued an injunction requiring the Petitioner to permit the photographing by videotape of the execution of Timothy Dale Bunch with Bunch's mask removed, and thereafter to participate in the autopsy of the body of said Bunch following Bunch's execution, as well as to take other similar actions.

The Petitioner has sought here a Writ of Prohibition under 28 U.S.C. § 1651 questioning the jurisdiction of the said district judge to have issued said order.

We note that the said order of the district court was issued at the eleventh hour, that is to say at about 7:15 p.m. before a scheduled execution time of 11:00 p.m., although the execution [illegible]

of Bunch had been set by the Circuit Court of Prince William County [illegible] including Poyner and his attorneys.

In addition to the aforementioned unseemly and undue haste in this matter of grave public importance, the petition for a Writ of Prohibition places grave doubt on whether the district court had any jurisdiction to act in the premises.

Because of the requirements of time, argument on the Petition for Writ of Prohibition could not be had; neither was there time to require memoranda. The papers before us, however, reveal on their face an attempt by Poyner to interfere in the execution of Bunch, and the jurisdiction of the district court to interfere in Bunch's execution at the instance of Poyner is very doubtful if it exists at all.

It is accordingly ADJUDGED AND ORDERED that the order of the district court referred to above in the case of Poyner v. Murray, Civil No. 92-CV-815, shall be, and it hereby is, stayed and held for naught until further order of one of the judges signing this order or of this court.

Because section 1651(b) indicates definitely that either Judge Widener or Judge Wilkinson or Judge Sprouse may enter this order as an individual judge they have signed the same as individual judges.

So far as they may be considered as acting for the court, they have signed this order as a panel thereof.

/s/ H. E. Widener, Jr.
H. E. Widener, Jr.
United States Circuit Judge

/s/ James M. Sprouse
United States Circuit Judge

/s/ J. Harvie Wilkinson, III
J. Harvie Wilkinson, III
United States Circuit Judge

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF WILLIAMSBURG
AND COUNTY OF JAMES CITY

COMMONWEALTH OF VIRGINIA

v. CRIMINAL NOS. 4868-A, 4869-A

SYVASKY LAFAYETTE POYNER

ORDER

On the 21st day of January, 1993, pursuant to Section 53.1-232 of the Code of Virginia, came the Commonwealth, by its Attorney, and the Defendant in person and with counsel, to be heard upon the Commonwealth's Motion to set an execution date.

There is presently no stay of execution in effect. Having determined that an execution date should be set, this Court hereby ORDERS that the execution of Syvasky Lafayette Poyner's death sentences be carried out on the 18th day of March, 1993, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before March 18, 1993, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Edward W. Murray, Director
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Entered this 21st day of January, 1993.

John M. Folkes
Judge

I ask for this:

George C. Fairbanks, IV
Commonwealth's Attorney

Seen and objected to:

Alexander H. Slaughter
Counsel for Syvasky Lafayette Poyner

A COPY TESTE:
HELENE S. WARD, CLERK
BY _____
Deputy Clerk

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. _____

SYVASKY LAFAYETTE POYNER,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

PETITION FOR APPEAL

EXECUTION SCHEDULED FOR MARCH 18, 1993

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I. PRELIMINARY STATEMENT

[illegible] Petition For Appeal from the order entered January 21, 1993, by the Circuit Court of the City of Williamsburg and James City County setting the date of Poyner's execution by electrocution. See Exhibit 1 (attached). The court erred by denying Poyner's motion for an evidentiary hearing to determine whether the recently redesigned and relocated electric chair in the Greensville Correctional Facility inflicts cruel and unusual punishment upon prisoners.

When Poyner was originally convicted in 1984, the Commonwealth executed prisoners in an electric chair in the State Penitentiary in Richmond. In 1990, however, the Commonwealth scrapped the old prison and the old electric chair, and located a new death chamber and redesigned electric chair in Greensville County, Virginia. Moreover, the Commonwealth changed its method of electrocuting prisoners in late 1991 after a botched execution in which the prisoner did not die as quickly as the Department of Corrections apparently expected. The Commonwealth decided for future executions to subject prisoners automatically to a second massive jolt of electricity. See Exhibits 2 and 3 (attached).

Based on substantial evidence gathered by his counsel concerning the gruesome cruelty of the new device and procedures, Poyner sought to challenge this new method of punishment below. Neither the Greensville electric chair nor the new procedure requiring the prisoner to undergo two jolts of electricity existed in 1984, so this is Poyner's first opportunity to assert

his constitutional claim in a Virginia state court. The lower court erroneously denied Poyner his "day in court" on this important issue.

This appeal implicates an issue of immense public importance: Is the Commonwealth of Virginia now executing prisoners in a cruel and unusual manner in violation of the Eighth and Fourteenth Amendments of the United States Constitution and in violation of Article I, Section 9 of the Virginia Constitution? A tribunal in the Commonwealth must eventually conduct an evidentiary hearing on the matter.

Although numerous cases, both federal and state, have stated the general proposition that death by electrocution is not cruel and unusual, no court in Virginia has ever reviewed any evidence about the physical effects of electrocution *as carried out in Virginia*. No litigant has ever presented a Virginia court with a proper record and evidence, as Poyner is prepared to do, on which a court can base a reasoned decision on the issue. Indeed, no court since 1890 has considered evidence about electricity's effect on the human body, despite significant advances in medical and scientific understanding of these phenomena. An evidentiary hearing on the nature of electrocution in Virginia that includes testimony of preeminent experts in the relevant fields of science and medicine is necessary to decide the issue.

This appeal should be granted to resolve an imminent split among the circuit courts of Virginia. The lower court's ruling in this case conflicts with the recent ruling of another circuit

court. The Circuit Court for Loudoun County agreed that a Virginia court must hear evidence on this very issue.[1] The Circuit Court for Loudoun County recognized that no court has reviewed the medical and scientific evidence concerning electrocution in over 100 years, and that no court has ever taken evidence on Virginia's method of electrocution. In setting aside five days to receive evidence, that court stated:

> And certainly science and technology has advanced an awful lot since 1890. And I feel somewhere a court has got to hear the evidence of what the state of the art is now on the effect of electricity on the human body during the course of execution by electrocution in Virginia.

Transcript, Commonwealth v. White, Circuit Court for Loudoun County, Crim. No. 8129 (February 11, 1993), at 5 (attached as Exhibit 12). The evidentiary hearing, however, never took place because the Commonwealth dropped the capital murder charge the next day and rendered the issue moot. Of course, the ruling in Loudoun County assures that other capital murder defendants will continue to assert this claim until this Court issues a definitive ruling on the propriety of an evidentiary hearing.

Although Poyner has previously pursued the ordinary course of appeals and habeas corpus petitions, he never had the opportunity to challenge the constitutionality of the new procedures and the redesigned electric chair in a Virginia court

---

[1]Poyner's counsel had appeared as special counsel for the defendant White for the sole purpose of presenting the constitutional challenge to Virginia's particular form of electrocution.

until the Commonwealth moved to set his execution date at the hearing on January 21, 1993. Over Poyner's objection, the trial court below denied Poyner's request for an evidentiary hearing on the issue and set the execution date for March 18, 1993. Poyner now faces a form of punishment that he contends causes unconstitutionally excruciating pain and torture. If this Court does not vacate the trial court's ruling and remand the case for a hearing, Poyner will not have had, and never will have, the opportunity to present his evidence to a court in this Commonwealth.

II. ASSIGNMENT OF ERROR

The court below erred in denying Poyner's motion for an evidentiary hearing regarding the constitutionality of Virginia's new method of electrocuting prisoners.

III. QUESTION PRESENTED

Did the court below err when it denied Poyner his day in court to present evidence in support of his claim that the Commonwealth's new electric chair in Greensville and new procedures for automatically applying a second jolt of electricity inflict unnecessary pain and torture in violation of the United States and Virginia Constitutions?

This question relates to the sole assignment of error.

IV. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Poyner was originally convicted of five counts of capital murder in 1984 in the respective circuit courts of Williamsburg, Hampton, and Newport News. Poyner was sentenced to death for each count. As of that time, Virginia's statutes required that death sentences be carried out by electrocution at the State Penitentiary in Richmond. Va. Code § 53.1-233 (Repl. Vol. 1988), amended, Va. Code § 53.1-233 (Repl. Vol. 1991)(the amendment rescinded the requirement that executions be performed in Richmond). Poyner appealed the convictions and death sentences to this Court, which affirmed each conviction and death sentence. Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815, cert. denied sub nom. Poyner v. Virginia, 474 U.S. 865 (1985). Although Poyner generally challenged the constitutionality of Virginia's capital murder statute on direct appeal to this Court, see Poyner v. Commonwealth, 229 Va. at 406, 329 S.E.2d at 820, he did not challenge the method of execution as it existed at that time.

Prior to 1990 (when the Department of Corrections began using the present electric chair in Greensville), Poyner unsuccessfully filed petitions for writs of habeas corpus in state and federal courts. Of course, the Commonwealth had not yet established a "two-jolt" procedure nor redesigned and rewired the electric chair. Thus, until now, Poyner has never been able to challenge in state court the new method by which the Commonwealth now seeks to execute him.

Poyner recently attempted to raise this issue in federal court in a class action under 42 U.S.C. § 1983, but he was denied the opportunity to present his evidence there. Poyner v. Murray, No. 92-CV-815 (E.D. Va. filed Dec. 10, 1992). See Complaint attached as Exhibit 4. The Fourth Circuit thwarted Poyner's attempt to present evidence on this issue when, on appeal of a simple discovery order and without briefs or arguments, it ordered the case to be dismissed. The Fourth Circuit's order of January 19, 1993, did not even address Poyner's claim concerning Virginia's particular method of electrocution; rather, the court relied on numerous cases standing for the proposition that electrocution is not per se unconstitutional. See Exhibit 5 (attached).

Poyner also sought below to present his evidence concerning the Greensville electric chair when the Commonwealth sought a date to execute Poyner with that device. On January 21, 1993, the Circuit Court for the City of Williamsburg and James City County held a hearing for the purpose of setting a date for Poyner's execution.[2] At that hearing, counsel for Poyner moved the court to conduct an evidentiary hearing on the issue of the constitutionality of this new method of execution by electrocution. The court denied Poyner's request and entered an

[2]Prior to the hearing and before the federal courts dismissed his case, Poyner had filed a Motion For Continuance in the circuit court based on the pendency of the federal court action. See Exhibit 6 (attached). This Motion For Continuance and its exhibits set forth the factual bases for Poyner's arguments that electrocution in Virginia is cruel and unusual punishment.

order over Poyner's objection providing that Poyner's execution by electrocution would be carried out on March 18, 1993.

Poyner appeals from the entry of that order, and specifically from the trial court's denial of the motion for an evidentiary hearing regarding the constitutionality of Virginia's particular method of execution by electrocution. The courts of this Commonwealth are charged with the duty to ensure that no prisoner be subjected to cruel and unusual punishment, no matter how unpopular his crime. The courts cannot discharge this duty without taking evidence. In this appeal, Poyner does not challenge the constitutionality of the death penalty itself, nor does Poyner ask this Court today to reach the merits of his claim because proper consideration of this claim requires evidence. Poyner simply wants an opportunity to be heard on this issue. Like any Virginian, he is entitled to his day in court.

V. STATEMENT OF FACTS

Poyner is subject to five death sentences. Death sentences in the Commonwealth of Virginia are carried out by electrocution. Va. Code § 53.1-233 (Repl. Vol. 1991). The Director of Corrections is vested with discretion to carry out the "proper execution of prisoners by electrocution." Id. He must maintain a "death chamber" with "all the necessary appliances" for electrocuting prisoners. Id. Exercising this discretion, the Director ordered that the electric chair be redesigned, re-worked, and rewired when the death chamber was moved to Greensville in 1990. Moreover, the Director directed a change in

procedures after the execution of Derrick Lynn Peterson on August 22, 1991. Peterson did not die according to plan when the electricity was first applied, thereby necessitating additional jolts of electricity to kill him. Within two weeks of Peterson's troublesome execution, the Director ordered that prisoners in future executions be subjected automatically to a second dose of electricity after a waiting period. See Exhibit 2 (attached). In addition, the Engineering staff from the Department of Corrections and the electric chair's manufacturer "visited the site to readjust the voltage and timing for use in executions." Id.

In its response to discovery requests in Poyner's federal action, the Commonwealth admitted that the electric chair in Greensville constituted a new appliance for the execution of prisoners. See Exhibit 7 (attached), at 1-2. The Commonwealth objected to disclosing any information that "predates the use of the electric chair at Greensville" as irrelevant because "Virginia's current electric chair . . . is located at the Greensville Correctional Center and has been in existence only since Greensville opened in October, 1990." Id. at 2. Thus, the Commonwealth itself considers the electric chair in Greensville a new and different device. Because Poyner's appeal to this Court arose in 1984, six years before the Commonwealth began to use this new device, he obviously could not have challenged its constitutionality in 1984.

In addition to these facts, Poyner has amassed substantial evidence from experts about the effects of the Greensville electric chair on the prisoners who are executed there. See Exhibits 4, 8, 9, 10 (attached). This evidence demonstrates that the prisoner does not die instantly, but rather suffers a cruel and excruciating death as his body literally cooks. The autopsy reports of prisoners electrocuted in Greensville paint an incredibly gruesome picture of the burning and cooking inflicted on the human body.[3] Although the Commonwealth has hundreds of photographs from these autopsies, it has fought vigorously to keep those photographs secret and has never produced them. At an evidentiary hearing, the fact-finder could review these reports and photographs to observe the gory mutilation of the body during an electrocution.

In addition, experts from the fields of neuropathology, neurophysiology, forensic pathology, and electrical stimulation are prepared to testify about the physiological effects of electrocution on the person. Based on autopsy reports and other objective evidence, these experts conclude that the electric chair tortures the prisoner who suffers a slow and shockingly painful [redacted] E.g., Exhibits 4, 8, 9, 10 (attached). Moreover, [redacted] pain experts have reviewed the available [redacted] prisoners with

[3]The Circuit Court for Loudoun County ordered the Commonwealth to produce these autopsy reports in the [redacted] case, and Poyner's counsel have therefore inspected the reports. However, the court entered a strong Protective Order that prohibits dissemination of the autopsy reports. See Exhibit 11 (attached). Consequently, Poyner's counsel are not free to include them here.

materials about Virginia's method of execution and are prepared to describe the horrific and unimaginable sensations that they believe are experienced by prisoners. Particularly during the application of multiple electrical jolts, it is likely that the electricity stimulates several regions of the human brain, many of which cause intense feelings of horror, pain, or dread when activated. Widespread and simultaneous activation of many parts of the human brain may well cause the individual to sense every form of pain and horor that can possibly be experienced. Even if this were not to occur and very little current actually reached the brain, then intense pain is likely to be felt from the extensive burns and maximal muscle contractions generated by the electricity. Unlike other forms of execution, this form of electrocution likely triggers responses throughout the many pain-related regions of the brain at the same time. Other forms of execution, such as hanging or the gas chamber, both produce brain death without directly exciting brain regions and excite other tissues that cause pain in a much more limited way.

Poyner has collected this evidence to show the courts what the Commonwealth is doing to prisoners in Greensville. If the courts are willing to consider this important issue of constitutional proportions, then the Director of Corrections will effectively [illegible] unfettered discretion to execute prisoners with no constitutional limitations. The Circuit Court for Loudoun County recognized that Virginia courts must play a role in this

area. The circuit court below erred when it ruled to the contrary.

VI. ARGUMENT

This Court should reverse the trial court's refusal to permit the presentation of evidence regarding the constitutionality of death by electrocution for four reasons: (i) Poyner has never had the opportunity to have his day in court to challenge the constitutionality of the new electric chair in Greensville; (ii) no Virginia court has ever heard evidence regarding the constitutionality of Virginia's procedures and methods for execution by electrocution; (iii) no state or federal court has heard evidence on the constitutionality of electrocution since 1890; and (iv) the evidence will show that electrocution as administered in Virginia violates the prohibition against cruel and unusual punishments contained in both the United States and Virginia Constitutions.

A. Poyner Must Be Allowed An Opportunity To Challenge Virginia's New Electric Chair And New Procedures For Executions.

This Court has consistently and zealously guarded the right to one's day in court:

> The trial court's conduct gave rough treatment to Mrs. Burts' right to due process. The Constitution of our Commonwealth makes crystal clear that "[n]o person shall be deprived of his life, liberty, or property without due process of law." Va. Const. art. I, § 11. In Moore v. Smith, 177 Va. 621, 626, 15 S.E.2d 48, 49 (1941), we said the following about the nature of due process: "A day in court. an

> opportunity to be heard, is an integral part of due process of law, everywhere recognized."

Burts v. Burts, 227 Va. 618, 619-20, 316 S.E.2d 745, 746 (1984). See also Shevel's, Inc. v. Southeastern Assocs., Inc., 228 Va. 175, 183, 320 S.E.2d 339, 344 (1984)(even though appellant bore heavy burden of proof in trying to establish affirmative defense, he was entitled to his "day in court" and an opportunity to carry his burden); Blue Cross of Virginia v. Commonwealth, 218 Va. 589, 598, 239 S.E.2d 94, 98 (1977) (appellant was entitled to its day in court to challenge the constitutionality of statute, and this Court remanded case to SCC for a determination of constitutionality). The lower court's denial of Poyner's motion for an evidentiary hearing has prevented Poyner from having his day in court on his contentions about the Greensville electric chair.

On February 10, only two weeks ago, the Circuit Court for Loudoun County held that a Virginia court ought to hear evidence on this very issue:

> [L]ooking at all the Virginia cases that were cited to me . . . there's just, for some reason, some sort of a blind adherence to this rule that came up from the decision of the U.S. Supreme Court back in 1890, that it's not cruel and unusual punishment for execution by electrocution; and that that decision was made without any real findings of fact, without any real factual basis to support it.
>
> And it just seems to me that we are a country, we pride ourselves in our Constitution, both our U.S. Constitution, our State's Constitution, Virginia's Constitution, as being a viable working

> document that is supposed to work with society as society's attitudes change over periods of time.
>
> And certainly science and technology has advanced an awful lot since 1890. And I feel somewhere a Court has got to hear the evidence of what the state of the art is now on the effect of electricity on the human body during the course of execution by electrocution in Virginia.

Transcript, Commonwealth v. White, Circuit Court for Loudoun County, Crim. No. 8129 (February 11, 1993), at 4 (attached as Exhibit 12). The ruling of the Circuit Court for Loudoun County is significant because a Virginia state court has now ruled that an evidentiary hearing is necessary and appropriate to determine whether execution by electrocution in Virginia violates the state and federal constitutional prohibitions on cruel and unusual punishments. Like the defendant in White, Poyner is entitled to present the evidence to a Virginia court.

The circuit court's ruling in Loudoun is especially significant because, only 45 minutes after the conclusion of the hearing in which the court explained why it felt compelled to hear evidence about electrocution in Virginia, the Commonwealth notified the court that "it was 98% sure" that it would be dropping the capital murder charges (which had been pending for over six months) against defendant White. Indeed, on the next day, the capital murder charges were officially dropped, thereby rendering the constitutional issue and the evidentiary hearing moot. The Commonwealth thereby avoided defending the

constitutionality of Virginia's electric chair in that proceeding.

Especially in light of the Virginia court's decision in Loudoun County, Poyner's previous attempt to raise this claim in federal court is not dispositive here. The Fourth Circuit acted without the benefit of a fully developed record, and in fact, dismissed the case immediately upon receiving a notice of appeal from a very limited discovery order. Within three hours of the filing of the Commonwealth's notice of appeal to the discovery order, before the Commonwealth had filed any papers supporting its appeal, and before Poyner had the opportunity to respond in any way, the Fourth Circuit panel entered a five-page order which did not consider directly the discovery issue on appeal. Instead, the federal appeals court took the extraordinary and unprecedented step of issuing a mandate to the federal district court to dismiss Poyner's lawsuit with prejudice. At the time of this ruling, the Commonwealth's motion to dismiss was still pending in the district court. Poyner's time to file his brief in opposition to the motion had not yet run, oral argument had not yet been held, and, of course, the district court had not yet ruled on Commonwealth's motion.

The federal court's reasoning was fundamentally flawed because it presumed all forms of electrocutions to be per se constitutional in every case. But, even if electrocution is a constitutionally permissible mode of capital punishment, not

every form of electrocution is automatically constitutional.[4] Stated another way, if all forms of electrocution were presumed constitutional and if the Director of Corrections decided to execute prisoners by hooking them up to car batteries and electrocuting them over a span of hours or days, no court would be entitled to review evidence of this torture method. The irony is that Poyner has alleged a far more painful torture, but he has not been allowed his day in court to prove it.

The Circuit Court for Loudoun County was well-aware of the Fourth Circuit's decision when it was considering whether to conduct the evidentiary hearing, and it recognized that the federal decision was simply not persuasive. The persuasive effect of the federal court's order should likewise be minimal in this Court, given the extraordinary procedural history and the failure to develop a record before ruling.

The Circuit Court for Loudoun County was prepared to hear Poyner's evidence. Poyner now faces the prospect of being executed by a method that he potentially can prove to be unconstitutional before he has a forum and a "day in court" to present his evidence.

This Court, therefore, should vacate the lower court's order and remand this case for an evidentiary hearing to resolve this important constitutional challenge.

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[4]Likewise, though the death penalty has been consistently ruled constitutional, not every method of inflicting capital punishment is per se constitutional.

B. No Virginia Court Has Ever Heard Evidence On The Constitutionality Of Virginia's Procedures Or Method Of Execution By Electrocution.

The oft-cited decisions of both Virginia and federal courts which have upheld the constitutionality of death by electrocution can be categorized in one of two ways: (i) decisions that cite no authority for upholding the constitutionality of electrocution,[5] or (ii) decisions that rely on the United States Supreme Court's 1890 decision in In re Kemmler, 136 U.S. 436 (1890), or on other decisions which, in turn, rely on Kemmler.[6] No court has considered modern medical evidence of the physiological effects of intentional electrocution. In fact, no

[5] Jones v. Whitley, 938 F.2d 536, 542 (5th Cir.), cert. denied, __ U.S. __, 112 S. Ct. 8 (1991); Lindsey v. Smith, 820 F.2d 1137, 1155 (11th Cir. 1987), cert. denied, 489 U.S. 1059 (1989); Johnson v. Kemp, 759 F.2d 1503, 1510 (11th Cir. 1985), aff'd, 781 F.2d 1482 (11th Cir. 1986).

[6] McCleskey v. Kemp, 481 U.S. 279, 299 (1987) (dictum); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 n.4 (1947); Lowenfield v. Phelps, 817 F.2d 285, 298 (5th Cir. 1987), aff'd, 484 U.S. 231 (1988) (incorporating the district court's opinion at 671 F. Supp. 423 (E.D. La. 1987)); Wilson v. Butler, 813 F.2d 664, 678 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988); Punchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir.), cert. denied, 475 U.S. 1133 (1986); Stockton v. Commonwealth, 241 Va. 192, 402 S.E.2d 196, cert. denied, __ U.S. __, 112 S. Ct. 280 (1991); Hoke v. Commonwealth, 237 Va. 303, 237 Va. 303, 377 S.E.2d 595, cert. denied, 491 U.S. 910 (1989); Townes v. Commonwealth, 234 Va. 307, 362 S.E.2d 650 (1987), cert. denied, 485 U.S. 971 (1988); Beaver v. Commonwealth, 232 Va. 521, 352 S.E.2d 342, cert. denied, 483 U.S. 1033 (1987); Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371, cert. denied, 469 U.S. 873 (1984); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

Virginia court has ever considered evidence in deciding the constitutionality of electrocution.[7]

This Court first reviewed the constitutionality of electrocution in Hart v. Commonwealth, 131 Va. 726, 743-44, 109 S.E. 582, 587 (1921), which directly relied on the holding in Kemmler as the foundation for its decision. Without analysis or evidence, Hart accepted the faulty factual premises of Kemmler as true. Id. Nevertheless, Hart expressly recognized that the Virginia Bill of Rights prohibits modes of punishments that "involve torture or lingering death." Id. Poyner is prepared to prove with contemporary evidence that electrocution in Greensville does "involve torture or lingering death."

Subsequent decisions of this Court can likewise be traced back to Kemmler as the basis for finding electrocution not cruel and unusual. In Martin v. Commonwealth, 221 Va. 436, 439, 271 S.E.2d 123, 125 (1980), this Court upheld electrocution citing Kemmler and its previous decision in Hart. Stockton v. Commonwealth, 227 Va. 124, 134, 314 S.E.2d 371, 378 (1984), relied on Kemmler and the decisions in Hart and Martin. In Beaver v. Commonwealth, 232 Va. 521, 527, 352 S.E.2d 342, 345-46 (1987), this Court relied on its decisions in Martin and

[7] Of course, this is not a failure of the Virginia courts because apparently no litigant has ever attempted to proffer evidence on this issue. This Court acts on the record before it. Without a record demonstrating that the electric chair is inflicting cruel and unusual punishment, this Court is constrained to uphold the constitutionality of the punishment. Poyner, however, was wrongfully denied the opportunity to present evidence and create a record for this Court to review. Therein lies the error of the circuit court below.

Stockton. In Stockton v. Commonwealth, 241 Va. 192, 215, 402 S.E.2d 196, 209-210, cert. denied, 112 S. Ct. 280 (1991), this Court simply referred to its decision in Martin as the basis for upholding electrocution.

This Court's decisions in Hoke v. Commonwealth, 237 Va. 303, 306, 377 S.E.2d 595, 597, cert. denied, 491 U.S. 910 (1989) and Townes v. Commonwealth, 234 Va. 307, 335, 362 S.E.2d 650, 6[illegible] (1987) also descend directly from Kemmler. In Hoke, this Court relied on a variety of decisions for upholding the Virginia Death Penalty statute and cited for its authority its previous decision in Gray v. Commonwealth, 233 Va. 313, 320, 356 S.E.2d 157, 160-61, cert. denied, 484 U.S. 873 (1987). In Gray, this Court upheld the constitutionality of the death penalty statute in Virginia based on previous decisions of the Court. However, the only cited decision which related to the constitutionality of electrocution was Stockton, 227 Va. at 134, 314 S.E.2d at 378, which in turn simply relied on the Kemmler opinion. In Stockton, the appellant did not present any evidence of the effects of electrocution.

In Townes,[8] this Court relied on its decision in Pope v. Commonwealth, [illegible] Va. 114, 121-22, 360 S.E.2d 352, 357 (1987), cert. denied, [illegible] U.S. 1015 (1988). In Pope, as in Hoke, the Court relied on a variety of decisions for upholding the Virginia [illegible]; Ritter [illegible] .Supp. 1499 (S.D. Ala.

[8]This Court indicated in Townes that it would adhere to its prior rulings regarding electrocution, but the opinion expressly acknowledged the possibility of overturning those precedents in the future. Townes, 234 Va. at 335, 362 S.E.2d at 666.

death penalty statute. However, the only two decisions which discuss the constitutionality of death by electrocution were Beaver and Martin. As discussed above, Beaver relies on Martin, and Martin directly relies on Kemmler. None of these cases considered evidence of the effects of electrocution because the litigants never proffered evidence. The litigants' failure to present this Court a complete record in those cases, however, should not preclude Poyner from developing a record in this case at an evidentiary hearing.

Moreover, no Virginia court has examined Virginia's new procedures for applying multiple jolts of electricity to prisoners. No court has reviewed evidence about Virginia's electric chair -- either in Richmond or Greensville -- to determine whether Virginia is unnecessarily torturing these prisoners. Such evidence must be heard because this Court has long said that the Virginia Bill of Rights prohibits "such bodily punishments as involve torture and are inhumane." Buck v. Bell, 143 Va. 310, 319, 130 S.E. 516 (1925), aff'd, 274 U.S. 200 (1927).

Courts in other states have considered similar challenges and taken evidence related to the functioning of a specific electric chair, as opposed to electrocution generally. See Thomas v. Jones, 742 F. Supp. 598 (S.D. Ala.), cert. denied, 497 U.S. 1042 (1990); Ritter v. Smith, 568 F. Supp. 1499 (S.D. Ala. 1983), aff'd in relevant part, rev'd in part on other grounds, 726 F.2d 1505 (11th Cir.), cert. denied, 469 U.S. 869 (1984);

Buenoano v. Dugger, No. 90-473-CIV-ORL-19, 1990 WL 119637 (M.D. Fla. 1990). As these courts recognized, the holdings in Kemmler and its progeny do not prevent an action from proceeding where the claim relates to the application of electricity in a specific electric chair or in a unique manner.

C. **No Federal Or State Court Has Considered Evidence Regarding The Constitutionality Of Electrocution Since 1890.**

Virginia is not alone in relying on the antiquated Kemmler opinion without the benefit of contemporary evidence.[9] In addition, federal case law continues to depend (almost as a reflex) on Kemmler for upholding electrocution.[10] Kemmler,

[9] Johnson v. State, 584 N.E.2d 1092 (Ind.) cert. denied, 113 S. Ct. 155 (1992); State v. Black, 815 S.W.2d 166 (Tenn. 1991); Stephens v. State, 580 So. 2d 11 (Ala. 1990) cert. denied, 112 S. Ct. 176 (1991); Buenoano v. State, 565 So. 2d 309 (Fla. 1990); Teague v. State, 772 S.W.2d 915 (Tenn. 1988) cert. denied, 493 U.S. 874 (1989); Godfrey v. Francis, 308 S.E.2d 806 (Ga. 1983), cert. denied, 466 U.S. 945 (1984).

[10] McCleskey v. Kemp, 481 U.S. 279, 299 (1987) (dictum); Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (does not discuss death by electrocution, but states that punishments are cruel when they involve torture or a lingering death); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 n.4 (1947); Lowenfield v. Phelps, 817 F.2d 285, 298 (5th Cir. 1987), aff'd, 484 U.S. 231 (1988) (incorporating the district court's opinion at 671 F. Supp. 423 (E.D. La. 1987)); Wilson v. Butler, 813 F.2d 664, 678 (5th Cir. 1987), cert. denied, 484 U.S. 1079 (1988); Porter v. Wainwright, 805 F.2d 930, 943 n.15 (11th Cir. 1986), cert. denied, 482 U.S. 918 (1987); Funchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir.), cert. denied, 475 U.S. 1133 (1986); Sullivan v. Dugger, 721 F.2d 719, 720 (11th Cir. 1983); Corn v. Zant, 708 F.2d 549, 563 (11th Cir. 1983), cert. denied, 467 U.S. 1220 (1984); Spinkellink v. Wainwright, 578 F.2d 582, 616 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979); Ralph v. Warden, Maryland Penitentiary, 438 F.2d 786, 789 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972)(dictum); Jackson v. Bishop, 404 F.2d 571, 577 (8th Cir. 1968).

however, cannot preclude Poyner from raising his claim in a Virginia court in 1993. The law, scientific knowledge, and society's sensibilities have evolved considerably over the last one hundred years, casting serious doubt on the basic premises of Kemmler. Nevertheless, the decision has inexplicably endured as the basis for courts throughout the country to mechanistically uphold electrocution, regardless of the particular method, as a constitutional means of execution. Modern medical and scientific evidence proves that Kemmler is no longer a viable foundation for the proposition that death by electrocution can never be cruel and unusual punishment. In addition to its outmoded science, the procedural history of Kemmler makes it even more surprising that it has endured so long without critical analysis. Because of courts' persistent reliance on Kemmler, it is important to review that decision in detail.

1. **Facts Of In Re Kemmler**

Execution by electrocution was examined by the New York state courts in People ex rel. Kemmler v. Durston, 119 N.Y. 569 (1890), and reviewed by the United States Supreme Court in Kemmler before any such executions were actually conducted in the United States. Thus, any evidence presented to the New York Court on the effects of execution by electrocution was necessarily speculative.

In Kemmler, the New York county court had reviewed the evidence presented to a court-appointed referee and ruled that it did not overcome the presumption of the constitutionality of the

legislation under the New York State Constitution (the Eighth Amendment not yet being considered applicable to the states) because the proof did not demonstrate "beyond doubt" that death by electrocution was cruel and unusual. Kemmler, 136 U.S. at 442. The standard of proof required by the court for this first challenge to electrocution, therefore, was an extraordinarily high "beyond doubt" standard, which would not apply to a contemporary challenge under the Federal or Virginia Constitutions. The New York State Supreme Court and Court of Appeals affirmed the ruling of the county court, but on the grounds that the courts were not competent to second-guess the factual findings of the legislature with respect to the constitutionality of legislation.

The New York Supreme Court stated that "there was nothing in the constitution of the government or in the nature of things giving any color to the proposition that, upon a mere question of fact involved in legislation, the judgment of the court is superior to that of the legislature itself, nor was there any authority for the proposition that in respect to such questions, relating either to the manner or the matter of legislation, the decision of the legislature could be reviewed by the court." See Kemmler, 136 U.S. at 442-43 (quoting the New York Supreme Court). The New York Supreme Court held that the presumption that the legislature had ascertained the facts necessary to determine constitutionality "was conclusive upon the court," noting that it agreed that the evidence presented did not meet the standard of

proof that would be required to overcome that presumption. See id.

The New York Court of Appeals affirmed the decision of the New York Supreme Court on similar grounds, holding that "[i]f it cannot be made to appear that a law is in conflict with the constitution, by argument deduced from the language of the law itself or from matters of which a court can take judicial notice, then the act must stand. The testimony of an expert or other witnesses is not admissible to show that in carrying out a law enacted by the legislature some provision of the constitution may possibly be violated." See id. at 443.

The United States Supreme Court affirmed the decision of the New York Court of Appeals on the grounds that, because the New York legislature had determined that electrocution did not inflict cruel and unusual punishment and the New York courts had sustained that determination, New York had not abridged Kemmler's privileges or immunities, nor denied him due process of law. Id. at 449.

2. The Kemmler Decision Is No Longer Legally Or Factually Valid

As stated previously, many courts have reflexively cited Kemmler for the proposition that death by electrocution is not cruel and unusual. However, scientific, medical and legal developments in the past 100 years have seriously eroded the precedential value of Kemmler.

First, courts no longer automatically defer on constitutional issues to state legislatures as the New York state courts and United States Supreme Court deferred to the New York legislature in Kemmler. More than twenty years ago, the Fourth Circuit Court of Appeals vindicated the authority of courts to review a legislature's decision generally, and specifically to review a legislature's enactments regarding criminal punishment. Ralph v. Warden, Maryland Penitentiary, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972). In Ralph, the State of Maryland argued that capital punishment was a purely legislative decision with which the judiciary should not interfere. The Fourth Circuit rejected the State's argument: "The fact that a Maryland statute authorizes capital punishment . . . does not conclusively establish the punishment's constitutionality, for the Eighth Amendment is a limitation on both legislative and judicial action." Id. at 788-89 (citing Robinson v. California, 370 U.S. 660 (1962)).

Second, to the extent that the New York courts were willing to consider evidence on the issue, Kemmler would have been required to prove "beyond doubt" that death by electrocution was cruel and unusual in order to obtain relief. Kemmler, 136 U.S. at 442. [redacted], in today's jurisprudence, courts apply a preponderance of the evidence standard for establishing an Eighth Amendment violation. See Blake v. Hall, 668 F.2d 58, 58 (1st Cir. 1981), cert. denied, 456 U.S. 983 (1982); McGill v. the court Duckworth, 726 F. Supp. 1144, 1148-49 (N.D. Ind. 1989), [illegible]

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part and rev'd in part, 944 F. 2d 344 (7th Cir. 1991), cert. denied, 112 S. Ct. 1265 (1992).

Kemmler is relied upon by courts today to dismiss claims without examining new scientific evidence demonstrating that electrocution is an excruciatingly painful and inexact process. In essence, courts have continued to rely on an opinion which relies on the judgment of a single 19th century judge who imposed a much higher standard of proof than would be imposed today. It is essential to reexamine the effect of electrocution on the human body, in light of scientific and medical advances, using a contemporary standard of proof.

Finally, scientific and medical knowledge have increased dramatically since 1890. The United States Supreme Court has recognized that the Eighth Amendment is not a static concept but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958). See also Ralph, 438 F.2d at 790-91. Furthermore, it has recognized that what is cruel and unusual "is not fastened to the obsolete." Gregg v. Georgia, 428 U.S. 153, 171 (1976) (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

The court below, by examining modern technological evidance and applying today's legal standards, was in a position to reconsider the long-standing and obsolete assumption that electrocution is immune from constitutional review, but the court refused to do so. Nevertheless, the constitutionality of

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electrocution is not, and cannot be, a closed debate given that the first, last, and only court to consider evidence of the effects of electrocution did so in the 19th century. Moreover, the Commonwealth's recent changes in its appliances and procedures dictate at least a hearing to review the effects of those changes. Poyner is simply trying to bring electrocution, and the scrutiny thereof, into step with contemporary medical science and "evolving standards of decency."

With the help of knowledgeable experts, Poyner is prepared to prove what modern science now knows about electrocution. This knowledge includes, for example, the excruciating pain suffered by the inmate as he actually burns and cooks during the electrocution process. See, e.g., Exhibits 4, 8, 9, 10. In 1890, before the first execution by electrocution, the "experts" were unaware of this phenomenon. It was also presumed that the inmate was instantly unconscious as the electricity was applied, but Poyner's experts have exposed the fallacy of this assumption. Our understanding of electricity was in its infancy in late 19th century, and medical science has advanced exponentially over 100 years. The time has come to analyze the constitutionality of Virginia's [redacted] chair using this modern body of knowledge.

Kemmler [redacted] the decision on which all cases upholding electrocution as a constitutionally sound means of execution rely. Since that decision is flawed due to the outdated factual determinations and legal principles, all of its progeny must fall. This Court should vacate the circuit court's ruling and

remand the case so that the trial court can review evidence against the Greensville electric [illegible] principles.

D. Electrocution As Administered In Virginia Violates The Prohibition Against Cruel And Unusual Punishments Contained In Both The United States And Virginia Constitutions.

If given the opportunity at an evidentiary hearing, Poyner is prepared to present evidence that electrocution as administered in the Commonwealth of Virginia inflicts wanton and unnecessary pain, in violation of the cruel and unusual punishment clauses of the United States and Virginia Constitutions. For instance, Poyner would prove the following:

(1) The Commonwealth attempts to walk an arbitrary and undefined line between too much and too little electrical current in executing condemned persons. The Commonwealth does not know the exact amount of current needed to render the condemned person instantaneously unconscious. The Director, or his designee, essentially guesses at the voltage that should be applied to kill the condemned person without causing the prisoner to explode. The General Assembly has never reviewed the issue, and no statute prescribes how electrocutions are to be carried out in Virginia.

(2) Because of the Commonwealth's desire to avoid a gruesome mess that shocks the sensibilities of the witnesses, it takes precautions to prevent the witnesses from observing the following:

(a) massive third degree burns to the head, arms, legs, and groin;

(b) morbid drooling and vomiting;

(c) defecation and urination;

(d) convulsions;

(e) horrific grimaces and grotesquely dilated pupils; and

(f) sickening smells of cooking flesh.

(3) Virginia's operating and testing procedures for its equipment are outdated and inappropriate.

(4) The Commonwealth's technology for executing persons by administering varying numbers of jolts of electricity externally to the head is antiquated. This is demonstrated by a large number of botched executions carried out within Virginia resulting in flames and smoke erupting from a prisoner's head, excessive bleeding, and other similarly grotesque consequences.

(5) The application of electricity, as done in Greensville, inflicts excruciating pain because it overstimulates every neuron in the brain's pain center simultaneously, while cooking the remainder of the body with intense heat. This results in unnecessary and unimaginable torture.

(6) Autopsy reports and photographs of executed prisoners depict the charring of flesh in places where the electrodes are not even attached, thus indicating some kind of malfunction in the electrical circuit.

The foregoing are not vague allegations, but rather delineate specific reasons why electrocution as currently administered in Virginia is cruel and unusual punishment. They are not unsubstantiated because these allegations are derived from the Commonwealth's own internal operating procedures, from objective facts, and from qualified experts.

The trial court erred in denying Poyner an evidentiary hearing to determine whether the Commonwealth is, in fact, inflicting pain in an unnecessary and wanton fashion.

VII. CONCLUSION

No matter how unpopular a person or his cause may be, he is entitled to his day in court when he presents a serious claim of constitutional dimensions. Poyner is not attacking his convictions or his death sentences; he is not challenging the constitutionality of the death penalty. Rather, he simply asks this Court to allow him to have his day in court to present his evidence -- never before heard in any court in this Commonwealth -- that the electric chair in Greensville is unnecessarily torturing prisoners in violation of our constitutional standards. Poyner respectfully requests that this Court award him an appeal to consider this issue of great public importance.

VIII. REQUEST TO BE HEARD ORALLY IN PERSON

Poyner, by counsel, pursuant to Rule 5:17(e), respectfully requests to state the reasons in person to the Court why this Petition should be granted.

SYVASKY L. POYNER

By _____
Counsel

Alexander H. Slaughter (VSB No. 05916)
Dorothy C. Young (VSB No. 31155)
Shannon E. Sinclair (VSB No. 30588)
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719 West 33rd Street
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(804) 233-6646

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 10th *day of* March, 1993.

Syvasky Lafayette Poyner, Appellant,

against Record No. 930301
Circuit Court No. F-4868-4

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Williamsburg and County of James City

Upon consideration of the record, the briefs filed herein and the argument in support of the granting of an appeal, the Court has determined that there is no merit in appellant's claim that the court below erred in refusing to conduct an evidentiary hearing regarding the constitutionality of Virginia's present method of executing prisoners. Accordingly, the Court refuses the petition.

A Copy,

Teste:

David B. Beach, Clerk

By: _____
Deputy Clerk

NO. 93-6052

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SYVASKY LAFAYETTE POYNER

v.

EDWARD B. MURRAY, Director,
Virginia Department of Corrections,
ELLIS B. WRIGHT, JR., Warden,
Greensville Correctional Center,
and JOHN DOE, Executioner

IMMINENT EXECUTION
(MARCH 18, 1993)

APPLICATION FOR STAY OF EXECUTION

Alexander H. Slaughter (VSB No. 05916)
Dorothy C. Young (VSB No. 31155)
Shannon E. Sinclair (VSB No. 30588)
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Counsel for Syvasky Lafayette Poyner

Syvasky Lafayette Poyner, by counsel, and pursuant to Rule 8 of the Federal Rules of Appellate Procedure, submits this application for a stay of his imminent execution, scheduled for March 18, 1993. Poyner requests that this Court stay his execution until such time as the United States Supreme Court has had the opportunity to decide on his Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, filed on March 11, 1993.[1] Application to the United States District Court for relief in this matter is not practicable because of the previous disposition of this case by this Court, which, upon receiving a Notice of Appeal of a discovery order, issued an Order and Mandate requiring the District Court to dismiss the entire lawsuit with prejudice. Poyner is applying to this Court for relief because Rule 23 of the Rules of the United States Supreme Court requires him to exhaust his remedies below before the Supreme Court will entertain a similar request.

I. Procedural History

In 1984, Poyner was convicted of five capital murders in the Circuit Courts of Williamsburg and James City County, Hampton, and Newport News. He was given five death sentences. The Virginia Supreme Court affirmed Poyner's convictions and sentences in a consolidated appeal on April 26, 1985. Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815 (1985). The United States Supreme Court denied his petition for certiorari on

[1] Exhibit 1.

October 7, 1985. Poyner v. Virginia, 474 U.S. 865 (1985) (2 cases) and 474 U.S. 883 (1985) (1 case).

Poyner filed petitions for a writ of habeas corpus in the three state circuit courts, and the petitions were dismissed in May, 1987. On April 29, 1988, Poyner's petitions for appeal of the habeas decisions were refused by the Virginia Supreme Court. (Record Nos. 870883, 870990, 870959). Poyner's petition for a writ of certiorari was denied by the United States Supreme Court on October 3, 1988. Poyner v. Bair, 488 U.S. 871 (1988).

In early 1989, Poyner simultaneously filed three petitions for a writ of habeas corpus, in essence a single consolidated petition, in the United States District Court, Eastern District of Virginia. (C.A. Nos. 89-203-N, 89-204-N, 89-205-N). The petitions were filed in the Richmond Division on January 12, 1989, and transferred to the Norfolk Division on March 15, 1989. On October 11, 1989, the Magistrate Judge recommended that the petitions be dismissed and, on December 21, 1990, the District Court dismissed the petitions. The dismissals were affirmed by the United States Court of Appeals for the Fourth Circuit on May 8, 1992. Poyner v. Murray, 964 F.2d 1404 (4th Cir. 1992). On November 2, 1992, the United States Supreme Court denied certiorari review. Poyner v. Murray, 113 S.Ct. 419 (1992).

On December 10, 1992, pursuant to 42 U.S.C. § 1983, Poyner filed the lawsuit at issue here, a class action challenging the constitutionality of the Virginia electric chair, in the United States District Court, Eastern District of Virginia (92 C.V.

815).[2] On January 19, 1993, in response to a bare Notice of Appeal relating to a discovery order, the United States Court of Appeals for the Fourth Circuit, sua sponte, issued an Order and Mandate requiring the District Court to dismiss Poyner's § 1983 action.[3] The District Court did so on January 20, 1993.[4] On February 2, 1993, Poyner submitted a Petition for Rehearing, Suggestion for Rehearing In Banc, and Petition for Recall of Mandate.[5] This Court denied that Petition on February 17, 1993.[6]

Meanwhile, on January 21, 1993, the Circuit Court for the City of Williamsburg and James City County scheduled Poyner's execution for March 18, 1993.[7] Poyner petitioned the Virginia Supreme Court for an appeal. That Petition was refused on March 10, 1993. (Record No. 930301).

On March 11, 1993, Poyner filed his Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, seeking review of the January 19, 1993 Order and Mandate requiring the District Court to dismiss Poyner's § 1983 lawsuit.

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[2]Exhibit 2.

[3]Exhibits 3 and 4.

[4]Exhibit 5.

[5]Exhibit 6.

[6]Exhibit 7.

[7]Exhibit 8.

II. Facts

Poyner has amassed a body of evidence proving that it is highly probable that a person subjected to intentional electrocution in the Virginia electric chair is neither instantaneously killed nor rendered instantaneously "unconscious" by the electric current applied to his body. Poyner's experts have explained in affidavits, and if given the opportunity will testify, that the subject of intentional electrocution in Virginia most likely suffers excruciating pain for an indeterminate period of time as he waits to expire from asphyxiation or ventricular fibrillation.[4]

As set forth in the Petition for Certiorari, the Fourth Circuit thwarted Poyner's attempt to present evidence on this issue when, on appeal of a simple discovery order and without the benefit of any briefs or arguments, it ordered the case to be dismissed. The Fourth Circuit's Order did not even address Poyner's claim concerning Virginia's particular method of electrocution; rather, the Court relied on numerous cases standing for the proposition that electrocution is not per se unconstitutional. The Fourth Circuit's Order also did not

[4]The Affidavits of Drs. Hillman, Devinsky, Ilgren, and Price are attached hereto as Exhibits 9, 10, 11, and 12. The Court will note that the affidavits of Drs. Ilgren and Price have been redacted. The redacted material relates to autopsy reports which are, for the time being, subject to a Protective Order preventing their use in any proceeding outside of the criminal proceeding Commonwealth v. Curtis Eugene White, Circuit Court of Loudoun County, Crim. No. 8129. Poyner hopes and expects that the Protective Order will be lifted or modified early next week so that he may present all of the evidence currently available to him.

consider directly the issue that was raised in the Notice of Appeal, but took the extraordinary step of directing the District Court to dismiss Poyner's lawsuit forthwith with prejudice. The Fourth Circuit's Mandate issued that same evening. Poyner's subsequent Petition for Rehearing, Suggestion for Rehearing In Banc, and Petition for Recall of the Mandate were denied.

III. Basis for Granting the Stay

Petitioner Syvasky Lafayette Poyner is scheduled to be executed in Virginia's electric chair at 11:00 p.m. on Thursday, March 18, 1993. Poyner has gathered proof that the method of execution which he is scheduled to undergo will unconstitutionally deprive him of his right to be free of cruel and unusual punishment, and a stay of execution pending disposition of his Petition for Certiorari is therefore necessary. Without a stay, he will soon be executed in a manner that is not simply unnecessarily painful, but in fact a form of torture.

While this case does not arise as a habeas corpus petition, but as an action pursuant to 42 U.S.C. § 1983, Poyner will assume for the purpose of this Application that the requirement that a habeas petitioner present "substantial grounds upon which relief might be granted" applies. Delo v. Stokes, ___ U.S. ___, 110 S.Ct. 1880, 1881 (1990); Barefoot v. Estelle, 463 U.S. 880, 895 (1983). As set forth in the Petition of Certiorari, Poyner has established gross procedural error on the part of the Fourth Circuit in treating a mere discovery order as an injunc-

subject to review pursuant to 28 U.S.C. § 1292(a)(1), and in transforming it into an opportunity to cause the case to be dismissed without a hearing. Moreover, the underlying claims made in Poyner's § 1983 Complaint are amply supported by substantial evidence, as shown by the affidavits attached as Exhibits hereto. Furthermore, as discussed just below, Poyner has engaged in no actions that should be construed as abuse of the writ. Cf. Barefoot v. Estelle, 463 U.S. at 895.

The Commonwealth will attempt to argue that Poyner is precluded by Gomez v. U.S. Dist. Court for the Northern District of California, ____ U.S. ____, 112 S.Ct. 1652 (1992) and McClesky v. Zant, ____ U.S. ____, 111 S.Ct. 1454 (1991) from raising this claim at this time. The circumstances of this case, however, differ in several salient respects from the activities that were construed as abuse of the writ in Gomez and McClesky.

While in Gomez the § 1983 plaintiff had filed his Complaint a mere four days before his scheduled execution, here, Poyner filed his Complaint on December 10, 1992, some six weeks before his execution date was set at a hearing held on January 21, 1993. Therefore, the concern expressed by the Supreme Court in Gomez with respect to the "obvious attempt at manipulation" is inapplicable. See Gomez, 112 S.Ct. at 1653.

Moreover, with respect to the applicability of McClesky through the Gomez case, Poyner's failure to raise this claim in his single previous opportunity to seek federal habeas corpus relief can be readily explained. His petitions were filed in

early 1989. At that time, the electric chair was still in Richmond, the botched executions of Wilbert Lee Evans (October 17, 1990) and Derick Lynn Peterson (August 22, 1991) had not yet occurred, the Greensville electric chair with its revamped wiring did not yet exist, and the Commonwealth had not yet instituted its policy of electrocuting prisoners with two jolts because of the likelihood that the first jolt would be insufficient to kill the condemned.[9] Thus, the "cause" prong of McClesky, 111 S.Ct. at 1470, is satisfied. The facts set forth in support of Poyner's Petition for a Writ of Certiorari and in the affidavits that accompany this Application establish the prejudice that McClesky also requires, and thus establish Poyner's right to a hearing on the issue he has raised. Id.

IV. Conclusion

For the reasons set forth above, Poyner respectfully requests that this Court grant his motion for a stay of execution pending the decision of the United States Supreme Court on his Petition for Writ of Certiorari.

Dated: March 12, 1993

RESPECTFULLY SUBMITTED,

By: Alexander H. Slaughter
Of Counsel

Alexander H. Slaughter (VSB No. 05916)
Dorothy C. Young (VSB No. 31155)
Shannon E. Sinclair (VSB No. 30588)
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[9]Exhibit 13.

Lewis F. Powell, III (VSB No. 18266)
Harry M. Johnson, III (VSB No. 29144)
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Counsel for Syvasky Lafayette Poyner

No. 93-6052

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SYVASKY LAFAYETTE POYNER

v.

EDWARD B. MURRAY, Director,
Virginia Department of Corrections,
ELLIS B. WRIGHT, JR., Warden,
Greensville Correctional Center,
and JOHN DOE, Executioner

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 1993, two copies of this Application for Stay of Execution in the above-entitled case were delivered by hand to Katherine B. Toone, Esquire, and Richard B. Smith, Esquire, Assistant Attorneys General, Attorney General's Office, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219.

Alexander H. Slaughter

ALEXANDER H. SLAUGHTER
DOROTHY C. YOUNG
SHANNON E. SINCLAIR
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Richmond, Virginia 23219
804-775-4346

Counsel for Syvasky Lafayette Poyner

FILED: March 13, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-6052

SYVASKY LAFAYETTE POYNER,

Petitioner,

versus

EDWARD B. MURRAY, Director, Virginia Department of Corrections, ELLIS B. WRIGHT, JR., Warden, Greensville Correctional Center, and JOHN DOE, Executioner,

Respondents.

ORDER

We have considered the application for a stay of execution filed by Syvasky Lafayette Poyner on March 12, 1993 and are of opinion the same is without merit.

Substantially all of the facts on which Poyner now relies have been public knowledge and easily available to him at least since the dissenting opinion of Justice Brennan in Glass v. Louisiana, 471 U.S. 1080 (April 29, 1985), which in turn relied upon some public factual sources dating back into the 1970s and earlier. The subject now at hand could and should have been raised by Poyner in his state and federal habeas petitions filed respectively on December 4, 1985 and in 1989, but was not raised until this current Section 1983 case was filed on December 10, 1992. We detect no

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States District Court for the Northern District of California, 60 U.S.L.W. 3733 (1992) (per curiam).

While the complaints about the electric chair at Greensville could have been raised at any time since 1991 when the chair was installed and were not, they are unproven and even if true are based on no factual premise which would show that the method of Poyner's execution would involve "cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947).

It is accordingly ADJUDGED and ORDERED that the said application for a stay of execution shall be, and the same hereby is, denied.

With the concurrences of Judge Wilkinson and Judge Sprouse.

H.E. Widener, Jr.
United States Circuit Judge
For the Court

A True Copy, Teste:
Herbert R. Hoffman, Clerk
By [illegible]
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
[illegible]

SYVASKY L. POYNER,

Plaintiff,

v. case no _____

COMMONWEALTH OF VIRGINIA, etc., et al.,

Defendants.

Before: HONORABLE ROBERT R. MERHIGE, JR.,
United States District Judge

December 10, 1992
Richmond, Virginia

IN OPEN CHAMBERS

Gilbert Frank Halasz, RPR
HALASZ & HALASZ
Court Reporters
P. O. Box 223
Richmond, VA 23202
(804) 741-5200

order, copies of which have been given, I think, at least the first [illegible] out what is requested.

This I think is a material part of it.

"It is adjudged and ordered that defendants are mandatorily enjoined, to permit Gilbert F. Halasz, this court's reporter, for purpose of supervising Charles Bradshaw, both of whom shall be permitted entry into the execution chamber of the Greensville Correctional Center at 9:00 p.m. on Thursday, December 10, or as soon thereafter as they may arrive, 1992 for the purpose of inspecting and videotaping with audio the execution of Timothy Bunch. Further adjudged and ordered that the execution be performed with condemned prisoner's face visible during the execution, providing same is agreeable to the condemned prisoner, who shall be asked to state his acquiescence or refusal in the presence of the aforementioned Gilbert F. Halasz. It is further adjudged and ordered that said Charles Bradshaw for the purpose of videotaping the execution be placed in a position whereby the camera would be able to observe the condemned prisoner's face.

There shall be no videotaping of any person other than the condemned prisoner.

In so far as possible, such taping shall be limited to condemned prisoners face.

Following said execution, videotape shall be placed [illegible] same to the Court prior to the viewing of said tape.

Further adjudged and ordered that the plaintiff may have one representative present to observe any autopsy, not participate in, but observe any autopsy that may be performed on the said Timothy Bunch.

I would ask counsel for the Commonwealth, you have been very cooperative, to notify the appropriate authorities of the entry of this order and see to it that a copy be delivered as quickly as possible. We will have an attested copy to give to Mr. Halasz to present when he arrives.

It follows that the tape will be sealed, kept under seal until the further order of the Court.

I don't know as there is anything else we can do.

MR. SLAUGHTER: May I address the Court?

THE COURT: Yes, sir.

MR. SLAUGHTER: Your Honor limited, as I heard the order, the videotaping to the face of Mr. Bunch. I believe it is contemplated if they got more of the body it will show --

THE COURT: Well, I only did what I thought you said.

MR. SLAUGHTER: No.

THE COURT: What I thought you said you wanted.

MR. SLAUGHTER: I appreciate that, Your Honor, but if

UNITED STATES DISTRICT COURT
[illegible]
Richmond Division

SYVASKY L. POYNER, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

EDWARD B. MURRAY, Director, Virginia Department of Corrections, ELLIS B. WRIGHT, Warden, Greensville Correctional Center, and JOHN DOE, Executioner,

Defendants.

Civil Action No.92-CV-815

REQUEST TO PERMIT ENTRY
UPON LAND FOR VIDEOTAPING AND INSPECTION

Plaintiff Syvasky L. Poyner, on behalf of himself and all others similarly situated, by counsel, pursuant to Rule 34(a)(2) of the Federal Rules of Civil Procedure, requests an order directing defendants:

1. To permit those persons designated by this Court, on receipt of consent to the same from Charles S. Stamper, entry into the execution chamber of Greensville Correctional Center one hour before the execution of Charles S. Stamper for the purpose of videotaping, with audio, Mr. Stamper's execution.

2. To permit plaintiffs' expert neuropathologist Dr. E. B. Ilgren entry into the medical examiner's office for the purpose of inspecting and observing any autopsy to be performed on Charles S. Stamper and to permit Dr. Ilgren to perform the routine and ordinary autopsy procedures on the brain described in Dr. Ilgren's attached affidavit.

Respectfully submitted,

SYVASKY L. POYNER,
on behalf of himself
and all others similarly situated

By _____
Counsel

Alexander H. Slaughter
Virginia State Bar No. 05916
Dorothy C. Young
Virginia State Bar No. 31155
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Harry M. Johnson, III
Virginia State Bar No. 29144
Sean P. McMullen
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951 Byrd Street
(804) 788-8200

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing request to be delivered by hand and telefaxed on January 14th, 1993, to:

John H. McLees, Esq.
Assistant Attorney General
Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219
Counsel to Defendants.

EXHIBIT
A

AFFIDAVIT OF E.B. ILGREN, M.D.

E.B. Ilgren, M.D., being duly [illegible] deposes and says as follows:

1. My name is E.B. Ilgren; M.D. I am a neuropathologist and am currently a member of the Faculty of Biology and Agricultural Sciences and Subfaculty of Biochemistry, University of Oxford. I received my M.D. from Hahnemann Medical University in 1974. I was board certified in Anatomic Pathology by the American College of Pathology in 1976. In 1982, I was certified in Neuropathology by the Royal College of Pathology in the United Kingdom.

2. I have been asked by the plaintiffs in Poyner v. Murray, et al., to consult with them on the effects of electricity on the human body.

3. I have reviewed the autopsy reports of Wilbert Lee Evans and Derrick L. Peterson prepared by the Medical Examiner for the Commonwealth of Virginia. The reports do not provide complete information on the effects of electricity on the bodies of people who have been executed in Virginia's electric chair.

4. To analyze of the effects of electricity on the human body, it would be beneficial to observe the autopsy of the next inmate executed in Virginia's electric chair.

5. Determining the condition of the human brain following an execution in Virginia's electric chair will provide information regarding the effects of electrocution on the human body.

6. Gross examination of the brain does not necessarily rule out abnormalities in the cellular structure of the brain. Microscopic examination of the brain tissue is required to rule out important cellular changes in the brain tissue.

7. The following routine post-mortem examination of the brain in necessary to determine the condition of the brain tissue:

a. The skull cap is removed in the usual fashion and the brain is gently lifted from its bony vault after the brain stem is transected with a scalpel at the base of the skull.

b. The brain is lowered whole and immersed in a vat containing no less than six times its volume weight of 10% firmalin.

c. A string is passed beneath the vessels of the circle of Willis to suspend the brain, upside-down, within the vat.

d. The brain is thus fixed for no less than four weeks whereupon it is examined in the routine way.

e. Examination includes weighing the whole brain and then obtaining the individual weights and dimensions of the cerebrum, brain stem and cerebellum.

f. All three of the above are then carefully sectioned in the coronial plane at the following intervals by means of a hand-held knife: cerebrum, one-half inch; brainstem, one-fourth to one-eighth inch; cerebellum, one-fourth inch.

g. The "coronal" slices are examined for gross abnormalities and then the following standard blocks (2 inches x 2 inches) are taken bilaterally: $A_{7,5,2,1}$; $P_{1,3,5}$; Basal Ganglia; Thalamus; Hypothalamus; Pituitary Gland; Cerebellum, vermis and hemispheres; midbrain, pons, medulla (upper, middle and lower).

h. The above sections are then embedded in parafin wax using routine methods, sectioned by microtome at 5-10 microns, and stained.

i. The sections thus produced are then examined under a light microscope to assess the morphological appearance of gray and white matter.

8. The method of post-mortem examination of the brain set forth above is a routine neuropathological examination to detect cellular irregularities in the brain.

E B Ilgren MD
E.B. Ilgren, M.D.

State of Pennsylvania
County of Montgomery

Subscribed and sworn before me this 14TH day of January, 1993.

Joseph A. Reale
NOTARY PUBLIC

My commission expires:

NOTARIAL SEAL
JOSEPH A. REALE, Notary Public
Lower Merion Twp., Montgomery Co.
My Commission Expires Dec. 12, 1994

for
MS
Shannon Sinclair

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

All Team

Bureau of Justice Statistics Bulletin

Capital Punishment 1991

By Lawrence A. Greenfeld
BJS Statistician

Eight States executed 14 prisoners during 1991, bringing the total number of executions to 157 since 1976, the year that the U.S. Supreme Court reinstated the death penalty. Those executed during 1991 had spent an average of 9 years and 8 months awaiting execution, about 1 year and 9 months longer on average than the 23 persons executed during 1990.

During 1991, 265 prisoners were received by State prison systems and 1 prisoner entered the Federal prison system under a sentence of death from the courts. During the year, 106 persons had their death sentence vacated, 2 had their sentence commuted, 1 received a conditional pardon by the governor, and 7 died while under a death sentence. At yearend, 34 States and the Federal prison system reported a total of 2,482 prisoners under sentence of death, a 5.8% increase over the number held at the end of 1990. All prisoners under sentence of death on December 31, 1991, had been convicted of murder. The median time since the death sentence was imposed for the 2,482 prisoners was 5 years.

About 7 out of 10 offenders under sentence of death for whom criminal history data were available had a prior felony conviction, about 1 in 12 had a prior homicide conviction. About 2 in 5 condemned prisoners had a criminal justice status at the time of the capital offense. Half of these were on parole; the rest were in prison, on escape from prison, on probation, or had charges pending against them. Nearly 15% of those sentenced to death between 1988 and 1991 had received 2 or more death sentences.

Status of the death penalty, December 31, 1991

Executions during 1991	
Texas	5
Florida	2
Virginia	2
Georgia	1
Louisiana	1
Missouri	1
North Carolina	1
South Carolina	1
Total	14

Number of prisoners under sentence of death	
Texas	340
Florida	311
California	301
Pennsylvania	137
Illinois	132
Oklahoma	125
Alabama	119
Ohio	111
Georgia	101
26 other jurisdictions	805
Total	2,482

Jurisdictions without a death penalty
Alaska
District of Columbia
Hawaii
Iowa
Kansas
Maine
Massachusetts
Michigan
Minnesota
New York
North Dakota
Rhode Island
Vermont
West Virginia
Wisconsin

Figure 1

October 1992

This Bulletin marks the 62nd consecutive year that the Federal Government has published statistics on executions. Since 1953 the Federal Government has also provided data on persons under sentence of death, expanding in recent years to include criminal history information and whether the condemned had a status with the criminal justice system at the time of the capital offense. Data are collected prospectively on each case after entering a death-sentence status so that removals of a death sentence, executions, and other changes in status are systematically followed. The series also tracks changes in statutes relating to the death penalty and major cases decided which may affect the application of the death penalty.

Computerized data on individuals who have been sentenced to death since 1973 are available to the public through the BJS-sponsored National Archive of Criminal Justice Data.

I would like to thank the many persons in State and Federal corrections agencies and offices of State attorneys general who make this annual report possible.

Steven D. Dillingham, Ph.D., LL.M
Director

The majority, 1,464 (59.0%), of those under sentence of death were white; 982 (39.6%) were black; 23 (0.9%) were American Indian; and 13 (0.5%) were Asian. Hispanic prisoners (184) accounted for 7.4% of those under a death sentence. Thirty-four (1.4%) of those under a death sentence were female. The median age of all inmates under a death sentence was 34 years and the median age at which they had been sentenced to death was 29 years.

Oregon — Clarified the role of alternate jurors during the sentencing phase of a capital trial if a juror who was present during the guilt phase is unable to serve; revised weighing the "issues" relevant to the appropriateness of the death penalty; instituted an automatic stay of execution if the defendant seeks a review from the U.S. Supreme Court; and enumerated new procedures to be used on remand during a resentencing proceeding if prejudicial error is determined to have occurred during sentencing.

Utah — Changed the term "first-degree murder" to "aggravated murder" and changed the term "second-degree murder" to "murder" and, in the section describing aggravated circumstances in capital felony sentencing proceedings, changed the word "murder" to "homicide."

Virginia — Added murders resulting from forcible sodomy or attempted forcible sodomy to the listing of capital murder circumstances.

Method of execution

At yearend 1991 lethal injection (22 States) and electrocution (12 States) were the most common methods of execution authorized (table 2). Six States authorized lethal gas, three States, hanging, and two States, a firing squad. Nine States authorized more than one method — lethal injection and an alternative method — generally at the election of the condemned prisoner or based on the date of sentencing.

Some States have stipulated an alternative to lethal injection, anticipating that it may be found unconstitutional. Each of the other four methods, previously challenged on eighth amendment grounds as cruel and unusual punishment, has been found to be constitutional. The method of execution for Federal offenders is that of the State in which the execution takes place.

Automatic review

Of the 36 States with capital punishment statutes at yearend 1991, 34 provided for review of all death sentences regardless of the defendant's wishes. Arkansas had no specific provisions for automatic review, and Ohio (ORC Section 2929.05) provides for review by the Court of Appeals and the Supreme Court "upon appeal." The Federal death penalty procedures do not provide for automatic review after a sentence of death is imposed. While most of the 34 States authorized an automatic review of both the conviction and sentence, Idaho, Indiana, and Montana require review of the sentence only. In Idaho review of the conviction must be appealed [illegible] of the conviction. Typically the review is undertaken regardless of the defendant's wishes and is conducted by the State's highest appellate court. If either the conviction or the sentence is vacated, the case may be remanded to the trial court for additional proceedings or for retrial. In resentencing, the death sentence may be reimposed.

Table 2. Method of execution, by State, 1991

Lethal injection	Electrocution	Lethal gas	Hanging	Firing squad
Arkansas[a,b]	Alabama	Arizona	Montana[a]	Idaho[a]
Colorado[a,c]	Arkansas[a,b]	California	New Hampshire[a,d]	Utah[a]
Delaware	Connecticut	Colorado[a,c]	Washington[a]	
Idaho[a]	Florida	Maryland		
Illinois	Georgia	Mississippi[a,e]		
Louisiana	Indiana	Missouri[a]		
Mississippi[a,e]	Kentucky	North Carolina[a]		
Missouri[a]	Nebraska			
Montana[a]	Ohio			
Nevada	South Carolina			
New Hampshire[a,d]	Tennessee			
New Jersey	Virginia			
New Mexico				
North Carolina[a]				
Oklahoma				
Oregon				
Pennsylvania				
South Dakota				
Texas				
Utah[a]				
Washington[a]				
Wyoming				

Note: Federal executions are to be carried out according to the method of the State in which they are performed.
[a]Authorizes 2 methods of execution.
[b]Arkansas authorizes lethal injection for those whose capital offense occurred after 7/4/83; for those whose offense occurred before that date, the condemned prisoner may select lethal injection or electrocution.
[c]Colorado authorizes lethal gas for those whose crimes occurred before 7/1/88 and lethal injection for those whose crimes occurred on or after 7/1/88.
[d]New Hampshire authorizes hanging only if lethal injection cannot be given.
[e]Mississippi authorizes lethal injection for those convicted after 7/1/84; execution of those convicted prior to that date is to be carried out with lethal gas.

Table 3. Minimum age authorized for capital punishment, yearend 1991

Age less than 18	Age 18	None specified
Alabama (16)	California	Arizona
Arkansas (14)[a]	Colorado	Delaware
Georgia (17)	Connecticut[b]	Florida
Indiana (16)	Illinois	Idaho
Kentucky (16)	Maryland	Montana
Louisiana (16)	Nebraska	Pennsylvania
Mississippi (16)[c]	New Jersey	South Carolina
Missouri (16)	New Mexico	Washington
Nevada (16)	Ohio	
New Hampshire (17)	Oregon	
North Carolina (17)[d]	Tennessee	
Oklahoma (16)	Federal system	
South Dakota[e]		
Texas (17)		
Utah (14)		
Virginia (15)		
Wyoming (16)		

Note: Ages at the time of the capital offense were indicated by the offices of the State attorneys general.
[a]See Arkansas Code Ann. 9-27-318(c)(1)(Repl. 1991).
[b]See Conn. Gen. Stat. 53a-46a(g)(1).
[c]Minimum age defined by statute is 13, but effective age is 16 based on an interpretation of U.S. Supreme Court decisions by the State attorney general's office.
[d]Age required is 17 unless the murderer was incarcerated for murder when a subsequent murder occurred, the age then may be 14.
[e]Age 10, but only after a transfer hearing to try a juvenile as an adult.

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COMMONWEALTH OF VIRGINIA

NINTH JUDICIAL CIRCUIT

CHARLES CITY COUNTY
GLOUCESTER COUNTY
JAMES CITY COUNTY
KING AND QUEEN COUNTY
KING WILLIAM COUNTY
MATHEWS COUNTY
MIDDLESEX COUNTY
NEW KENT COUNTY
YORK COUNTY
CITY OF POQUOSON
CITY OF WILLIAMSBURG

November 19, 1992

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Mr. Alexander H. Slaughter
Ms. Catherine N. Currin
McGuire, Woods, Battle & Boothe
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Re: Commonwealth v. Syvasky Lafayette Poyner
Circuit Court for the City of Williamsburg and County of James City
File No. 4868-A

Dear Ms. Currin and Gentlemen:

I have received communications from Mr. Fairbanks and Ms. Toone, Assistant Attorney General, indicating that they have no objection if I continue in the case for the purpose of fixing the execution date; however, I have had no response from Ms. Currin and Messrs. Slaughter and Johnson. Therefore, in order to prevent continued delay, I am recusing myself, and Judge John M. Folkes, of the Ninth Judicial Circuit, will sit in the matter. I request that each of you advise Judge Folkes of your earliest available date for the hearing.

Yours very truly,

G. Duane Holloway
Judge

GDH:mlw
cc: The Honorable John M. Folkes
The Honorable Randolph T. West
The Honorable Nelson T. Overton
The Honorable Helene S. Ward, Clerk
Mr. Milton Brown, Deputy Attorney General
Ms. Katherine B. Toone, Assistant Attorney General

71

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COMMONWEALTH OF VIRGINIA

NINTH JUDICIAL CIRCUIT

COURTS
CHARLES CITY COUNTY — MATHEWS COUNTY
GLOUCESTER COUNTY — MIDDLESEX COUNTY
JAMES CITY COUNTY — NEW KENT COUNTY
KING AND QUEEN COUNTY — YORK COUNTY
KING WILLIAM COUNTY — CITY OF POQUOSON
CITY OF WILLIAMSBURG

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December 8, 1992

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RECEIVED
DEC 14 1992

Re: Commonwealth v. Syvasky Lafayette Poyner - File No. 4868-A
Circiut Court for the City of Williamsburg and James City County

Dear Ms. Currin and Gentlemen:

Following Judge Holloway's letter to you of November 19, 1992, in reference to the above captioned case, I expected to be provided with your available dates. No communication has been forthcoming. I suggest that you contact my secretary, Linda J. Mason, (804) 693-1358, by December 21, 1992, with your available dates for a hearing in Williamsburg for the purpose of fixing the date of execution. If the Court does not recieve your dates by December 21, 1992, it will be necessary for the Court to proceed sua sponte, i.e., you will be notified of the hearing dated selected by the Court.

Mr. Harry M. Johnson, III
Mr. Alexander H. Slaughter
Ms. Catherine N. Currin
Page Two
December 8, 1992

Would you kindly attend to this matter forthwith. Thank you very much.

Very truly yours,

John M. Folkes, Judge

JMF:lm

CC: The Honorable Randolph T. West
The Honorable Nelson T. Overton
The Honorable Helene S. Ward, Clerk
Mr. Milton Brown, Deputy Attorney General
Ms. Katherine B. Toone, Assistant Attorney General
Mr. Richard B. Smith, Assistant Attorney General

COMMONWEALTH OF VIRGINIA

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RECEIVED
DEC 21 1992
DEPUTY ATTORNEY GENERAL

December 21, 1992

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RE: Commonwealth v. Syvasky Lafayette Poyner
File No. 4868-A Circuit Court for the
City of Williamsburg and James City County

Dear Ms. Currin and Gentlemen;

Following Judge Folkes' letter to you of December 8, 1992, and your response of December 16, 1992 coupled with a transmittal of your available dates, Judge Folkes has selected the date of January 21, 1993 at 11:00 a.m. for the purpose of setting an execution date in the above referenced matter in the Circuit Court of the City of Williamsburg and County of James City, Virginia. A transportation order has been prepared providing for Mr. Poyner's presence on the above referenced trial date. Thank you for your cooperation in these matters.

Very truly yours,

George C. Fairbanks IV

George C. Fairbanks, IV.
Commonwealth Attorney

GCFIV/epm

V I R G I N I A :

AND JAMES CITY COUNTY

COMMONWEALTH OF VIRGINIA	:	
V.	:	File No. 4868-A
SYVASKY L. POYNER	:	

MOTION FOR CONTINUANCE

Syvasky Lafayette Poyner, by counsel, respectfully moves this Court to continue the date scheduled for a hearing to set his execution date.

In support of this motion counsel states:

1. This Court has scheduled a hearing on January 21, 1993 to set Mr. Poyner's execution date.

2. On December 10, 1992, Mr. Poyner, on behalf of himself and all others similarly situated, filed a Complaint in the United States District Court for the Eastern District of Virginia, Richmond Division, against Edward W. Murray, Director, Virginia Department of Corrections, Ellis B. Wright, Jr., Warden, Greensville Correctional Center, and John Doe, Executioner, seeking permanent injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 with respect to the unconstitutional procedure and means utilized by the defendants and prescribed by the law of the Commonwealth of Virginia for executing prisoners in Virginia. See Complaint, Civil Action No. 92-CV-815, Exh. A.

3. Mr. Poyner's § 1983 lawsuit centers on an issue of [illegible] public and [illegible] whether the Commonwealth of Virginia is executing prisoners in a cruel and unusual manner in violation of the Eighth Amendment to the United States Constitution. As the Attorney General's Office itself has noted in a Motion for Enlargement of Time to respond to the Complaint, it "raises issues of substantial public interest." Motion for Enlargement of Time, Exh. B, at ¶ 2. The federal District Court has certified the action as a class action, and has designated Mr. Poyner the class representative. Final adjudication on the merits of Mr. Poyner's federal claim will have a direct impact on the subject of the hearing currently scheduled in this Court for January 21, 1993.

4. Mr. Poyner and the plaintiff class are represented in the § 1983 action by Hunton & Williams and McGuire, Woods, Battle & Boothe, which are committed to devoting the necessary resources for the proper adjudication of the issues raised in the Complaint.

5. Mr. Poyner intends to prove that the factual premises relied upon by earlier courts to uphold execution by electrocution as constitutional have been discredited by modern science. It is his contention that currently available medical and scientific evidence will demonstrate that "[e]xecution by electrocution results in the wanton and unnecessary infliction of pain," Complaint, Exh. A, at ¶ 15, and that the Commonwealth has deliberately sanitized the execution process to cover up the

"painful nature of electrocution, the antiquated technology [illegible] the primitive [illegible] machinery, the failure to use personnel qualified by education or training to carry off the executions, the number of botched executions and the certainty of pain." Complaint, Exh. A, at ¶ 46.

6. Mr. Poyner's civil lawsuit is not intended to interrupt actions taken by the Commonwealth pursuant to its legitimate duty to carry out lawful orders. Nor is his federal claim a dilatory attempt to postpone indefinitely his execution. Indeed, Mr. Poyner has requested expedited discovery in his District Court action and has sought expedited review of the related proceedings that are pending before the Fourth Circuit. See letter from Alexander H. Slaughter to Assistant Attorney General John H. McLees, dated January 7, 1993, Exh. C;[1] Plaintiff's Motion For Expedited Discovery, Civil Action No. 92-CV-815, Exh. D (to be filed today); Appellee's Motion for Expedited Briefing Schedule, No. 92-7228, Exh. E. The Attorney General's Office has declined to agree to the expediting of the appellate proceedings as proposed by Mr. Poyner, and is apparently making no effort to speed up the federal proceedings despite the immediacy of Mr. Poyner's execution scheduling hearing and the impending execution of a class member, Mickey Wayne Davidson,

[1]Counsel is, as of this writing, awaiting the Attorney General's reply to its proposed expedited discovery schedule in the underlying case pending in the District Court.

which has been scheduled for February 3, 1993. See Appellants' Fourth Circuit Docketing Statement, Petition for Writ of Habeas Corpus, Assistant Attorney General John H. McLees, dated January 6, 1993, Exh. G. The urgency of the situation has been heightened by Governor Wilder's decision this past weekend to deny clemency to Charles S. Stamper, and to set an execution date of January 19, 1993 for him.

8. Mr. Poyner requests a continuance of the January 21st hearing before this Court to preserve judicial resources and to permit adequate preparation for the pending federal trial. Mr. Poyner is utilizing all available means to expedite his litigation in the federal court. The setting of an execution date that might interfere with the prosecution of that lawsuit would result in costly litigation that could only detract from the District Court's consideration of the important constitutional question as to the legitimacy of Virginia's method of execution.

9. This Court has discretion as to the timing of the hearing to set an execution date. Moreover, the Court need not accept whatever execution date the Commonwealth's Attorney may suggest. Instead, the Court has discretion to determine what date is appropriate. In just the past year, the Circuit Courts of Buchanan and Henrico Counties have exercised that discretion in the cases of Roger Coleman and Herbert Bassette to refuse the dates offered by the Commonwealth in favor of dates that would allow for mature and deliberate consideration of pending

litigation or completion of clemency investigations. See Affidavits of Kathleen Behan and Patricia [illegible], Exhs. H and I. At the time of his hearing, Mr. Coleman had pending a successive habeas corpus petition that the court believed presented serious issues. In setting the execution date, then, the court allowed sufficient time for thoughtful and unhurried consideration of Mr. Coleman's petition. The reasons for deferral advanced in and accepted by the court in Mr. Coleman's case also argue for allowing Mr. Poyner to complete his pending litigation.

10. The Attorney General has referred to the grave public importance of the § 1983 action, and both sides obviously contemplate that significant labor will precede any hearing on the merits of that case. Mr. Poyner has already initiated the steps necessary to secure expeditious handling of the matter. These facts should inform this Court's exercise of its discretion in deciding whether to continue the January 21st hearing and, if the Court declines to continue that hearing, then in setting an execution date.

WHEREFORE, Mr. Poyner respectfully requests that this Court enter an order continuing the hearing to determine Mr. Poyner's execution date indefinitely until Mr. Poyner's lawsuit in the United States District Court For the Eastern District of Virginia, Richmond Division, has been adjudicated. In the alternative, if this Court should decide not to continue the hearing set for January 21, 1993, Mr. Poyner respectfully

requests that this Court set an execution date sufficiently far in the future as to enable Mr. Poyner to have a full and fair trial on the merits with regard to the important constitutional questions raised in his federal lawsuit.

Respectfully submitted,

SYVASKY L. POYNER

By _____
Of Counsel

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ATTORNEYS FOR THE PLAINTIFF

FILED
JAN - 8 1992
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

HERBERT R. BASSETTE, JR. Plaintiff, v. COMMONWEALTH OF VIRGINIA, EDWARD W. MURRAY, Director, Virginia Department of Corrections, D.R. LAWSON, Acting Warden, Greenville Correctional Center, MARY SUE TERRY, Attorney General of Virginia, and JOHN DOE, Executioner, Defendants.	)	CIVIL ACTION NO. 3:92CV11

PETITION FOR DECLARATORY RELIEF, AND TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

Herbert R. Bassette, Jr. ("Bassette"), by counsel, for his bill of complaint for declaratory relief and a temporary and permanent injunction against Edward W. Murray, Director of Virginia Department of Corrections ("Murray"), D.R. Lawson, Acting Warden Greenville Correctional Center ("Lawson"), Mary Sue Terry, Attorney General of Virginia ("Terry") and John Doe, Executioner ("Doe") states as follows:

JURISDICTION

(1) This is an action, pursuant to 42 U.S.C. § 1983, to redress the imminent deprivation, under color of a law of the Commonwealth of Virginia, of a right secured to Bassette by the eighth and fourteenth amendments to the Constitution of the United States.

(2) Jurisdiction is conferred on this Court by 28 U.S.C. § 1343.

JAN - 8 1992
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

PA

(3) Plainuff, Bassette, at all times relevant to this suit, has been a resident of Virginia and a citizen of the United States.

(4) At all times relevant to this suit, defendant Murray has been the director of the Virginia Department of Corrections. He has acted and will act in such capacity as the agent, servant, and employee of the defendant Commonwealth of Virginia in all actions he has taken and will take in deprivation of Bassette's constitutional rights. He is sued individually and in his official capacity.

(5) At all times relevant to this suit, defendant Lawson has been the Acting Warden of Greenville Correctional Center. He has acted and will act in such capacity as the agent, servant, and employee of the defendant Commonwealth of Virginia in all actions he has taken and will take in deprivation of Bassette's constitutional rights. He is sued individually and in his official capacity.

(6) At all times relevant to this suit, defendant Terry has been the Attorney General of Virginia. She has acted and will act in such capacity as the agent, servant, and employee of the defendant Commonwealth of Virginia in all actions she has taken and will take in deprivation of Bassette's constitutional rights. She is sued individually and in her official capacity.

(7) At all times relevant to this suit, defendant Doe has been an employee of the Department of Corrections of Virginia. He has acted and will act in such capacity as the agent, servant, and employee of the defendant Commonwealth of Virginia in all actions he

individually and in his official capacity.

(8) At all times relevant to this suit defendant Commonwealth of Virginia employed defendants, Murray, Lawson, Terry and Doe.

FACTUAL ALLEGATIONS

(9) On August 22, 1980, Bassette was convicted of capital murder in the Circuit Court for Henrico County. Bassette's punishment was fixed at death.

(10) On November 19, 1980, the Circuit Court for Henrico County accepted the jury verdict and sentence of death.

(11) In November of 1991, the Commonwealth of Virginia sought and obtained an Order from the Circuit Court for Henrico County to execute the sentence imposed upon Bassette.

(12) Bassette is scheduled to be executed on January 23, 1992.

(13) The Commonwealth of Virginia, and its agents Murray, Lawson, Terry and Doe, have expressed their intention to execute Bassette by electrocution pursuant to Virginia Code § 53.1-233 (1991).

(14) The method of execution chosen by the defendants violates the prohibition against cruel and unusual punishments found in the Eighth and Fourteenth Amendments to the United States Constitution.

(15) Electrocution, heralded as providing an instantaneous and humane death when invented in the late nineteenth century, provides neither.

Rather, the subject experiences great pain and agony as electricity passes through his body, raising his bodily fluids to the temperature of boiling water and searing third and fourth degree burns into his flesh.

(17) Death by electrocution is tantamount to being burned or cooked alive and, thus, is torturous and barbaric.

(18) When administered properly lethal injection provides a significantly more humane and less painful death than electrocution.

(19) Virginia's electric chair is antiquated and obsolete and it is likely that the electric chair will malfunction during the execution of Bassette. Moreover, the Commonwealth of Virginia provides inadequate training and utilizes unqualified personnel in the performance of executions. This increases the likelihood of human error and a lingering, tortuous death.

(20) Virginia's electric chair is mutilating the bodies of the people it kills. This is evidenced by at least two recent executions that were botched, the executions of Derrick Peterson and Wilbert Lee Evans.

(21) Both Peterson and Evans endured brutal, painful deaths because of the inability of Virginia's electric chair to provide an effective current of electricity to vital parts of their bodies.

(22) That these executions were unnecessarily torturous is evidenced by the observations of eye witnesses. These witnesses recounted in gruesome detail bleeding that

stain of his own bodily fluids.

(23) After the botched Evans execution, the Commonwealth of Virginia attempted to repair the chair, but to no avail. The second execution thereafter, that of Peterson, was also doomed to be a macabre event. Peterson was not killed by the first jolts of electricity that the Commonwealth sent surging through his body. It took the Commonwealth over twelve minutes to succeed in ending Peterson's life. Peterson assuredly endured unimaginable pain during this period. During that entire time, witnesses observed him wheezing and moaning.

(24) The electric chairs of other states, similar in design and age to Virginia's, also have experienced repeated malfunctions, with attendant prisoner suffering and torture.

(25) The proposed use of Virginia's electric chair to carry out the execution of Bassette's sentence by the Commonwealth, Murray, Lawson, Terry and Doe, all acting under color of state law and authority, has deprived and will deprive Bassette of rights secured to him by the Constitution of the United States, including his Eighth Amendment right of freedom from cruel and unusual punishment.

(26) This Petition is based upon the accompanying Memorandum, Exhibits and Affidavits.

WHEREFORE, Plaintiff Herbert R. Bassette, Jr. prays for the following relief from this Court:

1) That this Court temporarily enjoin the execution of Bassette's sentence by electrocution until a full hearing can be held to determine that the use of Virginia's electric

chief violates the proscriptions of the eighth and fourteenth amendments to the United States Constitution;

2) That after a full hearing on the merits, this Court declare that Virginia's electric chair fails to provide an instantaneous and humane method of execution and violates the proscriptions of the eighth and fourteenth amendments to the United States Constitution and permanently enjoin the Commonwealth, Murray, Lawson, Terry and Doe from fulfilling Bassette's sentence by use of Virginia's electric chair;

3) And for such other and further relief as this Court may deem appropriate under the circumstances.

By: _____
Counsel

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Counsel for Herbert R. Bassette, Jr.

FILED
JAN 17 1992
CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

HERBERT R. BASSETTE, JR. Plaintiff, v. COMMONWEALTH OF VIRGINIA, EDWARD W. MURRAY, Director, Virginia Department of Corrections D.R. LAWSON, Acting Warden, Greenville Correctional Center, MARY SUE TERRY, Attorney General of Virginia, and JOHN DOE, Executioner, Defendants.	Civil Action No. 3:92CV11

ORDER

Upon motion of the Plaintiff by Counsel and with the consent of Defendants, Plaintiff's action under 42 U.S.C. § 1983 shall be and the same is hereby DISMISSED with prejudice.

By agreement of the parties, each party will bear its own costs.

Let the clerk send a copy of this Order to all counsel of record.

/s/
UNITED STATES DISTRICT JUDGE

Dated 1-17-92

AFFIDAVIT OF J. SAMUEL GLASSCOCK, ESQUIRE

CITY OF SUFFOLK)
COMMONWEALTH OF VIRIGNIA)

THIS DAY APPEARED BEFORE ME, Jeanette C. Griffin, the undersigned Notary Public, in the jurisdiction aforesaid, J. Samuel Glasscock, Esquire, and stated under oath as follows:

1. My name is J. Samuel Glasscock and I reside in the City of Suffolk, Virginia. I am an attorney licensed to practice law in the Commonwealth of Virginia.

2. In 1982, I was a delegate to the General Assembly of Virginia representing the City of Suffolk, Virginia.

3. On August 10, 1982, I was a witness to the execution of Frank J. Coppola.

4. The Commonwealth of Virginia executed Coppola by applying two separate series of electrical current through his body, each lasting approximately 55 seconds.

5. During the second application of current, smoke began to flow from Mr. Coppola's head and leg. Soon, flames erupted from Coppola's leg near the site of the leg electrode and a sizzling could be heard that sounded like burning flesh. This flame and sizzling continued until the current was turned off.

EXHIBIT 9

PLAINTIFF EXHIBIT 3

6. I observed smoke and flames [illegible] amounts to fill the entire death chamber with a smoky haze.

7. Although I was in an isolated booth with other witnesses separated from the death chamber by glass and a wall, I could smell an odor that I assume was the smell of burning flesh.

8. Shortly after Mr. Coppola's leg caught on fire, the current was turned off. Within minutes, a medical examiner pronounced Mr. Coppola dead.

9. I do not believe that any representative of the news media was present at the time of the execution.

AND FURTHER THIS AFFIANT SAYETH NOT.

J. Samuel Glasscock, Esquire

Sworn to and subscribed before me this
2nd day of January, 1992.

Jeanette C. Griffin
Notary Public.

My commission expires Aug. 21, 1992.

Richmond Times-Dispatch

METRO

MAR 17 '93 11:01 HNR DIV [illegible]ON

Wilder doesn't plan to stop Poyner execution

BY MICHAEL HARDY AND FRANK GREEN
TIMES-DISPATCH STAFF WRITERS

Gov. L. Douglas Wilder said yesterday that he does not intend to stop the execution of convicted multiple murderer Syvasky J. Poyner, scheduled to die Thursday night in Virginia's electric chair.

"Unless something startling or revealing comes up, I have not seen a reason to intervene," Wilder told reporters at the Capitol yesterday.

Poyner, 36, is to die for the slayings of five Peninsula-area women over 11 days during a series of robberies in 1984, killings that turned the region into a terror zone.

In an interview Wilder characterized Poyner's actions as "barbaric in the form of execution." He shot each woman once in the head, saying that he did not want to leave any witnesses. He chose women as victims, he said, because they were easily frightened.

"There's no indication of innocence" or other mitigating claims, Wilder explained. Poyner confessed to the robberies and killings.

The governor also dismissed claims by some lawyers representing death row inmates that electrocution is unconstitutional because it is cruel and unusual punishment.

"If I felt that, I would not have gone along" with earlier executions, said Wilder, himself a lawyer.

Since he became governor in early 1990 he has refused to grant clemency to 10 men who died in the electric chair. He spared the lives of two condemned men, commuting their sentences to life in prison.

Meanwhile, Poyner's lawyers continued their battle to halt the scheduled execution at Greensville Correctional Center.

"We haven't heard anything officially" from the governor's office, said one of Poyner's lawyers, Alexander H. Slaughter. He declined to comment further. Slaughter was reached at the prison where he was visiting Poyner yesterday.

He said his client was fine.

Last week Poyner asked Wilder for a reprieve from Thursday's execution so that a court could hear evidence on the question of whether execution by the electric chair constituted cruel and unusual punishment.

Slaughter said that he plans to ask the governor for clemency, but that such a request had not been made as of yesterday afternoon.

The 4th U.S. Circuit Court of Appeals has dismissed Poyner's electric chair challenge and denied his request for a stay. Shannon Sinclair, another Poyner lawyer, said that the matter has been appealed to the U.S. Supreme Court.

The Richmond law firms of Hunton & Williams and McGuire Battle & Boothe have joined in an effort to get the use of the electric chair declared unconstitutional.

Apparently no court in the country has heard evidence about the effects of the electric chair on the human body for at least 100 years — since before the electric chair was used for the first time.

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SUPREME COURT OF THE UNITED STATES

SYVASKY LAFAYETTE POYNER, PETITIONER *v.*
EDWARD W. MURRAY, ELLIS B. WRIGHT JR.,
AND JOHN DOE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 92–7944. Decided May 17, 1993

The petition for a writ of certiorari is denied.

Opinion of JUSTICE SOUTER, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, respecting the denial of the petition for writ of certiorari.

Syvasky Poyner, an inmate sentenced to die in Virginia's electric chair, brought this case as a class action under 42 U. S. C. §1983 and the Eighth Amendment, challenging Virginia's use of electrocution as a method of executing people sentenced to death. Before filing this suit, he had already brought a petition for federal habeas corpus, on which relief was denied by the District Court: The Court of Appeals affirmed and this Court denied certiorari. *Poyner* v. *Murray*, 506 U. S. ___ (1992).

On the day this action was begun, the District Court orally certified a class of all present and future Virginia capital murderers. See Brief in Opposition 4. The following month, Poyner filed discovery requests seeking to videotape the execution of another inmate, Charles Stamper, to videotape the routine preelectrocution testing of the electric chair at Virginia's Greensville Correctional Center, and to permit a neuropathologist to observe Stamper's autopsy and collect samples of the executed inmate's brain tissue after it was removed and sectioned by the State's pathologist. At that time, the State's motion to dismiss was pending in the District Court.

The District Court denied the motion to tape the execution, but granted Poyner's two other requests. The State

appealed, and the Court of Appeals for the Fourth Circuit not only reversed the District Court's order, but without briefs or arguments remanded with instructions to dismiss the underlying action with prejudice. It is from this order that certiorari was sought in the instant petition.

Subsequent to the Fourth Circuit's action, Poyner's own execution was scheduled. On March 18, 1993, this Court denied his application for stay of execution of his sentence of death, *Poyner* v. *Murray* 507 U. S. ____ (1993), and he was executed. The Court did not, however, act on the petition for certiorari, which seeks review on behalf of the entire class. The Court denies their petition today.

I write separately to note that, because of the procedure used by the Court of Appeals, the members of the class will not be precluded by the Court of Appeals's judgment from bringing another action in the District Court raising the same constitutional challenge presented in this case, if they so desire. To begin with, it is clear that the Court of Appeals acted in this case without subject-matter jurisdiction. The only arguable basis for jurisdiction over the appeal from the District Court's interlocutory order at issue here was 28 U. S. C. §1292(a)(1). However, under a long line of authority the underlying discovery order of the District Court was not appealable as an injunction, because it did not provide "'some or all of the substantive relief sought by [the] complaint' in more than preliminary fashion." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, §3922, pp. 29–30 (1977).

More important, petitioners were not provided the "full and fair opportunity to litigate" the case below that is a prerequisite to application of principles of res judicata. *Montana* v. *United States*, 440 U. S. 147, 153 (1979); accord, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 329 (1971). (In this regard, I hardly need observe that the Court's action on the petition for certiorari today does not act as a disposition on the merits.)

Of course I do not mean to imply any opinion about

other procedural defenses to which any such further action may be subject, or about its underlying merits, beyond the suggestion conveyed by my separate writing that the claim should not be foreclosed. The Court has not spoken squarely on the underlying issue since *In re Kemmler*, 136 U. S. 436 (1890), and the holding of that case does not constitute a dispositive response to litigation of the issue in light of modern knowledge about the method of execution in question.